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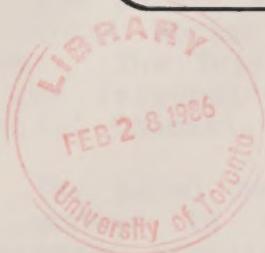
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Workers' Compensation Appeals Tribunal

DECISION NO. 1

Tribunal d'appel des accidents du travail



Panel Chairman: S. R. Ellis

Member: N. McCombie

Member: K. W. Preston

LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

January 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

Telephone: (416) 962-1600

WORKERS' COMPENSATION APPEALS TRIBUNAL
DECISION NUMBER 1

THE APPEAL PROCEDURE

The worker appeals the February 14, 1985, decision of the Workers Compensation Board Appeals Adjudicator, J.I. Daley.

The Appeal was heard on November 20, 1985, by a panel of the Appeals Tribunal consisting of S.R. Ellis, Chairman, N. McCombie a member of the Tribunal representative of workers and K.W. Preston a member of the Tribunal representative of employers.

The worker appeared and was represented by Mr. V. Vagners of the WCB's Worker Advisor's staff. The employer elected not to appear. The Tribunal was assisted by Ms. J.L. Marshall, a member of the Tribunal's Counsel Office, who appeared in the role of Tribunal Counsel.

The panel heard and considered evidence given under oath by the worker in oral testimony, and read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials. These materials were marked as Exhibit "1" at the hearing. It also read the Case Description recital of facts prepared by the Tribunal's Counsel office and agreed to by the worker's representative. Submissions were made by the Worker's representative and the Tribunal counsel.

THE ISSUE AND HOW IT ARISES

The worker's claim arises out of an accident on February 23, 1983, in which the punch press she was operating misfired and amputated her left index finger. The amputation occurred at a point about midway between the first and second joint.

The worker was treated by a surgeon to whom she was referred by her family physician. The treatment consisted of surgery in which pieces of bone were rongeured away from the amputation site and a flap of skin was grafted over the tip of the stump.

The finger did not heal as was expected. The worker continued to experience swelling and sensitivity in the finger and pressure on the stump. On June 24, 1983, the surgeon performed further surgery. In that surgery, the stump flap was raised and about 1/8 inch of bone was removed using small bone cutters.

The surgeon continued to monitor the worker's condition and on August 4, 1983, advised her - as confirmed in his report to the WCB of the same date - that she would be "able to return to work August 8".

At that time, the worker was still complaining that her finger was very tender and sensitive and that it would swell up and become very painful if she used her left hand extensively. The surgeon's view, however, was that no further medical treatment was needed and she should to be able to work.

The worker returned to work as directed on Monday, August 8, 1983 and was assigned to regular duty on a punch press. The finger became swollen and very painful. The next day she stayed away from work and treated her finger with an ice pack. She also called the surgeon. He advised her again that there was no further medical treatment necessary and that she should go back to work.

The worker returned to work on Wednesday, August 10th, but again her finger became very painful. She then spoke to her supervisor and told him she was going to take another two weeks off. The supervisor approved the two week lay-off period. The worker accordingly left work on August 10, 1983. Except for a short period of light duty from March 13 to April 6, 1984, in circumstances which will be described in due course, she did not work again.

The worker claims to be entitled to full compensation for the period August 10, 1983 to April 9, 1984, less the time worked on light duty. The post-April 9th compensation entitlement is not an issue in this Appeal.

The Appeals Adjudicator found that the worker was not totally disabled during this period and thus she did not qualify 1 for full compensation. He did find, however, that during the period in question she was suffering from a partial disability. Since she did not return to work, a partial 2 disability would still have qualified her under Section 41(1)(b) for full compensation for the period in question, had it not been for the fact that the Adjudicator also concluded that she had disqualified herself under Section 41(1)(b)(ii).

In his view she had disqualified herself by not being available for light-duty work which would have been suitable for her capabilities and which was available at her employer's plant. Section 41(1)(b)(ii) disentitles a person with a temporary partial disability from full compensation where he or she,

"fails to accept or is not available for employment which is available and which in the opinion of the Board is suitable for her capabilities".

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- 1 By "full compensation" is meant the temporary total disability compensation defined by Section 39.
 - 2 Unless otherwise noted all references in this decision to Sections of the Act are references to Sections of the pre-1985 version of the Workers' Compensation Act.

The Appeals' Adjudicator was of the view that the worker did not make a sufficient effort to obtain light duty work. He refers to the fact that she apparently made contact with her employer on only one occasion.

Accordingly, instead of full compensation, the Adjudicator's award was for benefits of 50% for the period from August 10, 1983 to April 9, 1984, less any time worked.

The 50% figure presumably represents the Adjudicator's determination under Section 41(2) of "the degree of earnings impairment resulting from the accident." Section 41(2) reads as follows:

"Where subclause (1)(b)(i) or (ii) applies, the compensation shall be a periodic amount proportionate to the degree of earnings impairment resulting from the accident as determined by the Board ..."

The worker does not dispute that she was indeed capable during this period of performing light duty. She is right handed and only her left hand was affected by the injury. However, she says in effect - to use the words of Section 41(1)(b)(ii) - that she did not fail to accept or be available for any available suitable employment - that is, that she did not disqualify herself from full compensation.

The issue for this panel, therefore, is whether on the facts of this case she may be said to have been unavailable for work which was available and which was suitable having regard to her disability. There is no suggestion that any work was actually offered to her during the period in question.

REASONS FOR THE TRIBUNAL'S DECISION

During the hearing, the worker was questioned extensively by members of the panel as well as by Tribunal counsel and of course, by her representative Mr. Vagners. The panel found the worker to be an honest and straightforward witness.

One thing that should be particularly noted at the outset of these reasons is that from the WCB's reports and memoranda and from some of the medical reports, it appears that throughout the relevant period there was some question in the minds of those dealing with the worker as to whether or not she was exaggerating the difficulty she was having with the amputated finger. There is in the materials a suggestion that perhaps the worker was being too sensitive - i.e., not being tough enough - and failing to cope appropriately with the minimal degree of residual pain and discomfort ordinarily associated with an amputation of this nature. That those doubts were entirely misplaced was eventually demonstrated when in April the worker, after consulting other doctors, finally did have a third operation on her finger.

In that operation the new surgeon identified and removed a large "neuroma" and also removed some small pieces of metal. A neuroma is an unorganized mass of nerve fibres which occurs occasionally in wounds or in an amputation stump and which is very sensitive and painful. Accordingly, all of the evidence must be read in light of the fact - now known for a certainty - that throughout the relevant period the worker's finger was indeed very painful and sensitive.

The panel does not doubt that there was light work at her employer's plant which the worker could have been performing during this period. Her supervisor confirmed that fact to the Board's investigator and it is also evidenced by the circumstance that at the end of February when the worker's new surgeon Dr. Heckadon finally authorized her for light duties she was able to obtain such work with her employer without difficulty.

That suitable work exists is not, however, sufficient reason for disqualifying a worker under Section 41(1)(b)(ii). It must also be "available" to the worker. In this case, the worker was acting throughout the period in question on the belief that light duty was not available to her from her employer unless and until she had a doctor's letter advising that she was only capable of light duty.

The worker had returned to full-duty work at the plant on August the 8th in response to her first doctor's directions to that effect. She knew on the basis of that experience that she was in fact unable to perform full-duty work. Her problem at that point was that her doctor did not believe that the condition of the finger was any different from what would normally be expected at a similar stage in any similar amputation. He would not authorize light duty. Neither would he recommend further medical treatment. It was not until November that her family doctor, received from the WCB authorization to refer the worker to another specialist. At about the same time the worker found a doctor who was a family friend who agreed to refer her to a new specialist. Thus, in December she went to two specialists: Howard P. Adams, M.D., F.R.C.S.(C) and Robert G. Heckadon, M.D., F.R.C.S.(C), F.A.C.S., both plastic surgeons specializing in hand surgery.

It is apparent, therefore, that certainly through the period from August 10 to the visits to the new specialists in December, the worker was in the position of knowing that she could not do full-duty work, of believing that light duty was not available without a doctor's order and of not being able to get a doctor to prescribe light duty. The panel is therefore satisfied that during that period of time it is not correct to say that there was any light duty work "available" to the worker.

The worker saw Dr. Adams on December 8, 1983, and Dr. Heckadon on December 14. Dr. Heckadon arranged for her to return for a second examination on February 22nd, 1984, at which time he made arrangements for further surgery. The surgery was performed on April 10th, 1984.

The reports of Dr. Adams covering the worker's visit on December 8th and of Dr. Heckadon covering the visit to him on December 14th, do not refer to the question of what work she was capable of doing. Dr. Adams expressed uncertainty as to the "degree of disability she really has"--an uncertainty we now know to have been misplaced. Dr. Heckadon's report to the worker's family physician clearly describes a significant disability but does not address in so many words her ability to work. It is not clear on the evidence whether the worker asked at either of those meetings for a recommendation concerning light-duty work. The subject was however dealt with in the February 22nd meeting with Dr. Heckadon. In Dr. Heckadon's report of that meeting to the Worker's Compensation Board, he mentions that the worker stated that her employer would only give her light duty if he knew how long she would be on light duty and when she could return to her normal duties. This indicates that a discussion between the worker and her employer about the availability of light-duty work occurred, probably following the December appointment with Dr. Heckadon.

The WCB investigator's report of his discussion with the worker's supervisor indicates that it was not true that the employer would not make light duty available without knowing how long the light duty would last. However, the supervisor did recall the discussion referred to in Dr. Heckadon's letter and indicated that he certainly would have asked the worker how long it was expected that she would remain on light duty. The panel does not find it surprising that the worker interpreted that question as indicating that the employer required information from a doctor about the probable period of time that light duty would be necessary before it would take her back. That impression is reflected in the conversation reported by Dr. Heckadon. Thus the worker continued under the impression that light work was not available--this time because she was unable to inform the employer how long she would require it.

The worker testified that Dr. Heckadon gave her a note concerning light duty on February 22nd and told her to stay off for two weeks and then return to employment on light duty.

She followed those instructions and returned to light duty work with her employer on March 13th, 1984. She continued at that work until April 6th and had the new surgery on her finger on April 10th.

This panel is satisfied that the worker believed for substantial reasons that she was not entitled to a light-duty assignment unless she could get a doctor's instructions to that effect. She was unable to get such an instruction until February 22nd when she received those directions from Dr. Heckadon. Once she received those directions she returned to work. In those circumstances, it cannot be said that work suitable for her capabilities was in fact available to her during the period in question, or that she had made herself unavailable for any such work.

The panel was therefore satisfied that for the period in question the worker was not disqualified under the terms of Section 41(1)(b)(ii) and is entitled to full compensation.

DECISION

The appeal is therefore allowed and the Workers' Compensation Board is directed to pay The Worker the additional to which she is entitled. The panel leaves to the Board the calculation of the amount in question without prejudice to the worker's right of further appeal should there be any dispute concerning that calculation.

Dated at Toronto the 9th day of December, 1985.

Signed: S.R. Ellis, N. McCombie, K.W. Preston

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Workers' Compensation Appeals Tribunal

DECISION NO. 2

Tribunal d'appel des accidents du travail

Panel Chairman: S. R. Ellis

Member: Douglas Jago

Member: Lorne Heard

LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

January 1986

Workers' Compensation Appeals Tribunal

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Workers' Compensation Appeals Tribunal

DECISION NO. 2

THE APPEAL PROCEDURE

The worker appeals the September 26, 1984, decision of the Workers' Compensation Board Appeals Adjudicator, J.V. D'Andrea.

The appeal was heard on November 25, 1985, by a panel of the Appeals Tribunal consisting of S.R. Ellis, Chairman, Lorne Heard, a member of the Tribunal representative of workers, and Douglas Jago, a member of the Tribunal representative of employers.

The worker appeared and was represented by Mr. Vagners of the WCB's worker advisor staff. The employer was represented by Mr. Watt, the employer's Manager, Personnel and Labour Relations, and Ms. M. Faubert appeared as the Tribunal's counsel.

The panel heard and considered evidence given under oath by the worker in oral testimony and read the relevant forms, memorandum, reports and medical reports extracted from the WCB file and collected in the Case Description Materials.

The panel also read the Case Description recital of facts prepared by the Tribunal's counsel office. Both the worker's representative and the employer's representative had an opportunity to see the Case Description prior to the hearing and to make submissions on it. General submissions were made by the worker's representative, the employer's representative and by the Tribunal's counsel.

THE ISSUES AND HOW THEY ARISE

The worker was employed as a furniture packer when she sustained a back injury on July 5, 1982. She was lifting a heavy coffee table to put it in a box when she suffered a sudden pain in her back. At the time of the accident, she was 51 years of age and had been employed by the accident employer for approximately 3 years. The worker laid off immediately following the injury and received temporary total disability benefits from July 5, 1982 to January 17, 1983.

From December 3, 1982, to January 14, 1983, the worker was treated at the Board's Rehabilitation Centre. On release, she was discharged as fit for modified work. The modified work specified was work allowing frequent position change with light lifting only and with no repetitive bending or twisting.

The worker takes the position that the Centre's assessment was wrong and that she was and remained totally disabled until June 14, 1983, the time when she reported to the WCB that she was ready to resume light duty work.

The full compensation for temporary total disability was discontinued on January 17, 1983, on the basis of the Board's view that at that time the worker was only partially disabled. The worker having declared herself to be still totally disabled was, according to the Board, unavailable for suitable work, and as a result, the compensation for the partial disability was reduced to 50% pursuant to Section 41(1)(b)(ii) and 41(2) of the Act.

The main issue for the panel, therefore, is whether during the period January 17, 1983 to June 14, 1983, the worker was totally disabled or only partially disabled.

If the panel were to conclude that the worker was only partially disabled during this period, further questions would arise:

1. Whether the WCB's decision on January 17, 1983, to reduce the benefits, effective January 17, 1983, was justified under the provisions of Section 41(1)(b)(ii), and, if so
2. Whether 50% was an appropriate determination under Section 41(2) (and whether the Tribunal has the right or the obligation to consider that issue).

THE PANEL'S REASONING:

There is no dispute that the worker suffered a compensable injury to her back. She received compensation for temporary total disability for over 6 months after the accident. Subsequently, she received 50% compensation for partial disability. In 1984, a WCB Doctor recommended a 15% permanent pension because of this injury. Thus, there is no question that she was disabled. The question is whether during the period in question she was totally disabled or partially disabled.

At the hearing, the worker testified under oath that during the period relevant to this appeal she was totally disabled. This is consistent with evidence that during the relevant period she had indicated to both the Rehabilitation Counsellor at the WCB Rehabilitation Centre and a Rehabilitation Counsellor whom she subsequently contacted that she felt herself to be totally disabled.

A worker's testimony with respect to his or her own condition is important evidence. It cannot, however, be conclusive. It is obvious that a worker's interest in the outcome of an appeal provides a motive for exaggerating the disability. A worker is also capable of honestly underestimating his or her ability to perform modified work. A worker's testimony under oath is a significant part of the evidence but a part that must be considered along with all the other parts.

¹Pursuant to Section 132 of the revised Act, unless otherwise stated, all section references are to the section numbers as they existed prior to April 1, 1985.

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There are several reports by the worker's family physician which are relevant to the period in question and which are supportive of the worker's claim. In a report to the WCB signed April 15, 1983, 3 months after the WCB's conclusion that the worker was only partially disabled, he indicated his opinion that the worker was still unable to do any work at all.

Also supporting the worker's claim is a notation on the WCB file by a WCB Counsellor whom the worker visited on February 21, 1983, to the effect that considering the worker's temporary partial 50% benefit status, the worker appeared to the Counsellor to be "quite disabled".

In addition, there is a statement in the January 24, 1983, report of Dr. Handelsman, a specialist in Rheumatology, that the worker was "presently unemployable". It must be noted, however, that when this statement is taken in context and in light of subsequent reports, it may simply have indicated that the worker was not capable of performing her former job. In his January report, the doctor indicated that the worker suffered from low back pain following a lumbosacral strain. He outlined a number of measures including weight loss and abdominal strengthening which might help the worker. The doctor then concluded that, "Although she is presently unemployable, hopefully with the above modalities, she can return to work". In a report written almost 1 1/2 years after this initial report, Dr. Handelsman indicated that his conclusion in January 1983 was only that the worker could not at that time return to her former job. In his report of July 1983 and his subsequent report, he indicated that the worker should try to return to a lighter form of work since there was very little improvement in her symptoms between January and July, 1983. His reports, taken together, suggest that although the worker was not able to perform her former job, she may have been capable of performing lighter work during the period relevant to this appeal.

This view of the evidence is consistent with a memorandum written by a WCB Rehabilitation Counsellor. On March 7, 1983, the Counsellor noted that he telephoned the worker's specialist who indicated that "while the injured worker may have mechanical pain, she still should be fit for modified employment".

There is considerable medical evidence indicating that the worker's condition did not improve significantly during the year after her injury. Since the worker received total disability benefits after the injury, it could be argued that she continued to be totally disabled. However, with the exception of her family physician, the doctors' final reports all indicated that the worker was capable of, or should attempt to perform, light work. This evidence therefore supports a finding that the worker was partially rather than totally disabled. The reports are as follows:

- a) In a January 14, 1983, report on the occasion of the worker's discharge from the WCB Rehabilitation Centre, Dr. Chisholm reported that in his view the worker "is presently considered fit for modified work allowing frequent position change, with light lifting only and with no repetitive bending or twisting". This opinion was based on three examinations of the worker conducted by Dr. Chisholm himself over the period from the admission to the Centre to the discharge, and on the reports of other staff personnel who had treated the worker during her stay in the centre.

The worker's representative pointed out that the reports from the Centre confirm that the worker's condition was not improved by the treatment at the Centre. He argued that since the Admission Report of December 3, 1983, indicated Dr. Chisholm's opinion that the worker should be able to return to her job after further treatment, the fact that further treatment produced no improvement should lead to the conclusion that she remained totally disabled. However, it is apparent from the December 3 report that Dr. Chisholm was anticipating that further treatment would lead to essentially full recovery--ie. a return "to her job". He was not addressing on December 3, whether or not she was at that point capable of modified employment. It was only after the further treatment did not help, that he turned to an assessment of her abilities in respect of modified employment.

- b) In an April 15, 1983, report the WCB's Dr. H.B. Jackson said: "...the objective findings relative to this lady's compensable low back strain ... support partial disability only".

This opinion was based on the objective findings of Dr. Handelsman, the rheumatology specialist, rather than on an actual examination of the worker by Dr. Jackson himself. It must, therefore, be accorded significantly less weight than the other reports. It is, however, another professional's view of the probable implications of the symptoms recorded by Dr. Handelsman.

- c) In his July 11, 1983, report, Dr. Handelsman who had examined the worker at her family physician's request both in January and again in July, 1983, reported that the worker "is only minimally improved since I last saw her ... I feel that she should try to return to a light form of work which does not involve any lifting and does not involve prolonged sitting in a chair".
- d) In a January 12, 1984, report, Dr. A. Ameis, a specialist practising Physical Medicine and Rehabilitation, indicated his opinion that the worker "might benefit ... from an early return to some modified work". This examination occurred outside the time period in dispute, but given the evidence that there has been little improvement in the meantime, it is a relevant observation of at least some significance.

In considering the worker's testimony that she was totally disabled, we have also to take into account the fact that the worker's employer was experiencing a general layoff during the period relevant to this appeal. It would be unrealistic in assessing the evidence not to recognize the particular interest any worker would have when his or her plant is on lay-off in continuing to receive a full disability pension. The special motive a worker in such circumstances would have to exaggerate the degree of his or her disability, were he or she so inclined, must be acknowledged. Presumably, also, the absence in such circumstances of a strong motive to get well would have some subconscious negative impact on a worker's real perception of his or her own condition.

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It is of some significance in that respect that the worker's call to the WCB Counsellor advising him that she now felt fit for light work came on the Monday morning of the week during which the recall at the worker's plant was about to reach the worker's position on the seniority list. The Counsellor phoned the employer, and his note to the file indicates that he was told that the worker could, as a result of her seniority, be recalled "either this week or next" and that she should contact the company "as soon as possible".

It will of course rarely be possible in cases of this nature for the Appeals Tribunal to be satisfied that it knows for certain what the situation was. The Legislature has recognized the difficulty the WCB and the Tribunal will often have in this regard. A 1985 amendment (Section 3(4)) has now explicitly provided that where the evidence for and against any particular view of an issue is approximately equal, the issue is to be decided in favour of the claimant.

This was also the principle followed prior to 1985 by the WCB as a matter of policy. Since it is obviously a sound approach to the question of onus in compensation matters we are satisfied that it is right for the Tribunal to approach pre-April 1, 1985, cases as though the new Section 3(4) had always been there.

The Section 3(4) onus principle arises, however, only when the evidence for and against is approximately equal. Thus in each case the hearing panel must weigh the evidence for and against and rely on the onus provision only if in its carefully considered opinion the evidence on each side is indeed approximately equal in weight.

The evidence will not be equal in weight if the hearing panel after carefully weighing the evidence for and against is left with a concrete opinion that one answer is more probable than the other. In such a case, the hearing panel must accept the more probable answer as the fact. The balance-of-probabilities standard of proof is applicable to findings of fact in civil court cases and is the standard which both the WCB and the Appeals Tribunal apply.

In weighing the evidence in this case we have kept in mind the hearsay nature of much of the evidence and the inherent problems concerning the reliability of such evidence. We are satisfied, however, that it is right and necessary for this Tribunal to have regard to memoranda and reports which accumulate in the WCB records notwithstanding their hearsay nature. And, of course, there is no question of our right to consider such evidence. Section 81(b) (revised Act) applies to the Tribunal and empowers it to "accept such oral or written evidence as in its discretion it considers proper whether admissible in a court of law or not."

In our opinion, written reports of doctors made within a few days of the examination of their patients, and written memoranda or other records created by Counsellors or other WCB officials in the ordinary course of their routine duties, are inherently quite reliable, as far as they go. They are more reliable, typically, than the recollections and reconstructions of the same people two or three years after the event.

In considering such hearsay documentary evidence it is necessary, however, that the Tribunal be ever wary about its inherent limitations.

In this case, after weighing the evidence for and against, we find that we are left with a concrete opinion as to which answer is more probable. In our opinion, it is more probable that the worker was capable of the modified work described by Dr. Chisholm than that she was totally disabled. Accordingly, we must conclude that during the period of January 17, 1983, to June 14, 1983, the worker was capable of modified work. She was capable of performing the work that Dr. Chisholm prescribed: work that involved frequent position change, light lifting only and no repetitive bending or twisting.

It is important to note that it does not necessarily follow from this conclusion that we think the worker was not telling us the truth or even that we think it more probable that she was not. Our decision is simply that on the available evidence we think it is more probable than not that the worker was in fact capable of modified work. That is a long way from our being satisfied that the worker was deliberately misleading us and the Board, and it is important to make the distinction clear. It is bad enough from the worker's point of view to lose the compensation without having the decision be taken as evidence of bad faith. Our conclusion could be wrong, or her honest opinion as to the extent of her capabilities during this period could be wrong.

The point is that in circumstances where the actual reality of a past situation is unknowable - certainly by us, but perhaps also by the worker - a decision must nevertheless be made. In appeals to this Tribunal, the law requires the decision to be based on the best opinion of a hearing panel as to which amongst the various possible realities is the more probable.

The decision that the worker must be found to have been only partially disabled does not, however, dispose of the appeal. Workers who are temporarily partially disabled and who do not return to work are entitled to the same compensation as those who are totally disabled (Section 41 (1)(b)) unless they fail to make themselves available for suitable employment which is available (Section 41(1)(b)(ii)). The Appeals Adjudicator's decision to reduce the compensation to 50% was based not only on his view that the worker was partially disabled but also on his conclusion that by declaring herself to be totally disabled the worker had disqualified herself from full compensation under the provision of that Section. She had by that declaration failed to make herself available for suitable work.

It is obvious that the worker did indeed not make herself available for suitable employment. She declared herself totally unfit and thus unavailable for any work at all. But on the wording of the Section is her unavailability alone enough to disqualify her? Or must there also be evidence that there was suitable work available had she been available to take it? The words of the Section are "...available for employment which is available". There was no evidence before the Appeals Adjudicator and there is no evidence before us that in the winter and spring of 1983 suitable work was available.

Workers' Compensation Appeals Tribunal

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The availability-of-work issue is an issue of which neither the Workers' Compensation Board nor any of the parties will have had notice. It is an issue in respect of which this Tribunal has not had the benefit of any evidence or of submissions from the parties' representatives or from its own counsel. We have, therefore, concluded that it is necessary to postpone a final decision in this case and to convene another hearing to consider that issue.

Also, if the Appeals Adjudicator were right in concluding that the worker had disqualified herself for full compensation, the panel would then have to consider as well whether it should proceed to decide whether the reduction to 50% was justified. The 50% benefit reflects a determination by the Board under Section 41(2) of a "periodic amount" that was "proportionate to the degree of earnings impairment resulting from the injury". This is another issue in respect of which the Tribunal has not so far heard evidence or submissions.

DECISION

1. The panel finds that during the period in question the worker was not totally disabled but was capable of performing work which allowed frequent position change, required light lifting only and involved no repetitive bending or twisting.
2. The outcome of the appeal is reserved pending a further hearing on the following issues:
 - a) Whether or not the worker was disqualified for full compensation by reason of being unavailable for suitable available work under the terms of Section 41(1)(b)(ii), and
 - b) If she was so disqualified, whether the panel should proceed to examine the amount of compensation paid under Section 41(2). If it decides that it should examine this, the panel would have to decide whether 50% is a proper determination of the amount that was proportionate to the degree of earnings impairment resulting from the injury.
3. In addition to any representations which the worker or employer may consider relevant, we shall be interested in hearing representations and any evidence relevant to the following questions:
 - a) In order to find that a worker is disqualified by Section 41(1)(b)(ii) from receiving full compensation, must it first be shown that suitable work was available to the injured worker? In other words, does the worker's obligation to be available only arise once work is available or does it exist whether or not work is available?
 - b) When is suitable work "available"? For example, is it "available" when suitable jobs are likely to be found in the community, or is it "available" only when a particular suitable job is in fact available?

- c) What evidence concerning such availability would be relevant and where would the burden for providing any such evidence lie--with the WCB? the employer? the worker?
 - d) Might the burden of proof on the issue shift at any point?
 - e) If we were to conclude that availability of work must be proven, where there had been no attempt to do so at the Appeals Adjudicator level would the Tribunal have the right or the obligation to investigate the question on its own initiative? Or must it--should it--proceed on the basis that because there was no evidence at the WCB hearing, there is no evidence?
 - f) If evidence of availability of work is found to be required as part of the grounds for disqualification, what evidence of the availability of work exists for this worker during the time period in question?
 - g) In view of all of the foregoing, what should be the Tribunal's decision in this case on the issue of the worker's disqualification under 41(1)(b)(ii)?
 - h) If a review of the determination by the Board under Section 41(2) is indicated, what standard of review should the Tribunal apply? Should the panel be asking, for example, what the panel would have decided in the Appeals Adjudicator's place? Or is it sufficient that in the panel's view the determination falls within a range of reasonable judgment? What other standard might be appropriate?
 - i) What evidence of "degree of earnings impairment" is available?
 - j) What evidence if any, is necessary?
 - k) Given a decision on the appropriate standard of review, should the determination of 50% in this case be approved?
4. The Tribunal Counsel's office is directed to organize the further hearing.
 5. Since the Tribunal's decision on these issues is likely to have some impact on the Workers' Compensation Board's policies and practices concerning disqualification decisions generally, the TCO is also directed to advise the Board of the hearing on these issues and to seek its cooperation in obtaining information concerning the relevant Board's policies and practices and the existence of relevant evidence of the availability of work.

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6. This panel also suggests that the TCO invite the WCB to appear as a participant in the hearing for the purpose of making submissions and presenting evidence on these questions.

Dated at Toronto this 27th day of January, 1986.

Signed: S.R. Ellis, Lorne Heard, Douglas Jago.

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Workers' Compensation Appeals Tribunal

DECISION NO. 4

Tribunal d'appel des accidents du travail

Panel Chairman: S. R. Ellis

Member: Douglas Jago

Member: Brian Cook

LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

January 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

Telephone: (416) 962-1600

Workers' Compensation Appeals Tribunal

DECISION #4

THE APPEAL PROCEDURE

This is an employer appeal of the May 10, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, Mr. V. W. Ferguson. Mr. Ferguson's decision overruled the decision of the Board's Claims Review Branch dated June 4, 1984.

The appeal was heard on November 28 and December 12, 1985, by a panel of the appeals tribunal consisting of S.R. Ellis, Chairman, Brian Cook, member of the Tribunal representative of workers and Douglas Jago, member of the Tribunal representative of employers.

The appellant employer was represented at the hearings personally by its president. For convenience of reference the president of the employer will be referred to in this decision as the "employer".

The worker appeared and was represented by Mrs. Mary Tzaferis of the Office of the Worker Advisor. The Tribunal was assisted by David Starkman, the Tribunal's General Counsel, who appeared at the hearing as the Tribunal's counsel.

The panel heard and considered testimony under oath of two fellow employees of the worker - who were called to testify by the employer; testimony under oath of the worker himself and of a fellow employee called to testify by the worker, and testimony under oath of the worker's wife and daughter. The panel also read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description materials.

The panel also had the benefit of the history of the incident and claim as it appears in the Case Description and approved by the parties.

Submissions were made by the employer, by the worker's representative and by the Tribunal's counsel.

THE ISSUE AND HOW IT ARISES

The worker had been employed at the employer's plant for approximately 11 years as a welder/fitter. He was engaged in constructing large stainless steel tanks.

On January 11, 1984, while at work he twisted his right knee. The cause of the injury is the matter in dispute. The employer's position is that the injury was caused by horseplay and must accordingly be found not compensable. The worker's position is that the injury was caused in the ordinary course of his employment. He claims that he lost his footing while descending from the top of the tank on which he was working.

There is no dispute as to the fact that the injury occurred nor as to the nature or extent of the injury.

The panel must therefore decide on the basis of the evidence before it, how the injury occurred.

If the panel were to decide that the injury in fact occurred as a result of horseplay, it would then be necessary to consider the consequences of that finding and a number of further issues would arise:

- 1) Can an injury caused by horseplay be said to be an injury caused by an accident "arising out of and in the course of employment"? See Section 3(1).¹
- 2) If it is an injury arising out of and in the course of employment, then is it non compensable because it is "attributable solely to the serious and wilful misconduct of the worker"? See Section 3(1)(b).
- 3) If it is an injury caused by serious and wilful misconduct, is it nonetheless compensable because it is an injury resulting in "serious disablement" as that term is used in Section 3(1)(b)?

The Panel's Reasoning

The evidence of the employer's eyewitness was that the injury occurred when the worker was grabbed from behind by a fellow worker and flipped to the ground. The eyewitness characterized the event as in effect a friendly bit of horseplay. The evidence is that the worker did not provoke the attack.

On the evidence of the employer's eyewitness, the worker was, therefore, at worst, the non-participating victim of horseplay. It is, accordingly, apparent that even if we accept the employer's version of events, the worker is entitled to compensation for his injury. The reasons are obvious.

In the first place, a non participating victim of horseplay is not guilty of serious or wilful misconduct under the provisions of Section 3(1)(b) and so he is not disentitled on those grounds. There is, therefore, no necessity to consider whether or not the injury constituted a serious disablement.

In the second place, since the definition of "accident" includes "a wilful and intentional act, not being the act of the worker" (Section 1(1)(a)(i)), the only question that remains under the provisions of Section 3(1) is whether this accident is an accident "arising out of and in the course of the employment". And this panel is satisfied that at least in the circumstances of this case where the alleged horseplay was an unremarkable piece of foolery, an injury to a non participating victim of horseplay is an injury arising out of and in the course of employment.

¹

Pursuant to Section 132 of the revised Workers' Compensation Act, unless otherwise indicated all section number references are to the section numbers as they existed prior to April 1, 1985.

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Thus, in the panel's opinion, even on the employer's view of how the injury arose, the entitlement to compensation is clear.

In the interest of the worker, however, it is important to record that the panel accepts the worker's version of the accident as the correct one. There were substantial conflicts and inconsistencies between the testimony of the two employer witnesses and between the testimony of the employer witness who was the eyewitness, as given at the hearing, and statements of his previously recorded. There was also evidence that the employer's witness who was not the eyewitness and who was the dominant one of the two employer witnesses had a hostile personal relationship with the injured worker. On the evidence it was also not clear that the eyewitness had a full opportunity to see the accident. It appears possible that he incorrectly interpreted the worker's fellow employee's attempt to pick the worker up after his fall, as part of a horseplay scenario. We found the injured worker and the fellow employee who testified on his behalf to be credible witnesses.

DECISION

The appeal is dismissed. The worker's entitlement to compensation remains as determined by the Board's Appeals Adjudicator.

TECHNICAL NOTES

There are three technical matters which arise in respect of this appeal but do not affect its outcome. The panel's discussion of those matters may be seen in the Appendix.

Dated at Toronto this 14th day of January, 1985.

Signed: S.R. Ellis, B. Cook, D. Jago

Workers' Compensation Appeals Tribunal

TECHNICAL APPENDIX TO DECISION NO. 4

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Panel Chairman: S.R. Ellis
Member: Douglas Jago
Member: Brian Cook

January 14, 1985

Note 1: Character Evidence

In this case the worker's wife and daughter were called as witnesses. They were called for two purposes. One was to show that the worker told a consistent story to various people immediately following the incident. The other was to introduce evidence about the worker's character and particularly as to his general reputation as a man of integrity.

The evidence on the first point would likely be excluded by a court as self-serving evidence but it is not without some weight and we say no more about it. The panel is doubtful, however, whether evidence on the latter point ought to have been heard and thinks that the admissibility of such evidence in future cases deserves careful consideration with a view to excluding it.

Character evidence of this nature is generally not persuasive. Any panel will be well aware that the worker's representative would not call any witness to testify about the worker's character who was not prepared to be laudatory and positive. Accordingly, such evidence will rarely be of much influence. At the same time, a practice of hearing such evidence also presents some serious practical difficulties. Any exploration of a worker's character and of his general reputation for integrity that was truly meaningful would involve a large number of witnesses and would invite the employer to call witnesses who hold a contrary view. To accept such evidence is therefore to either engage in a meaningless exercise or to expand the hearing in a major way. A Tribunal practice of hearing general character evidence will also create a situation where a failure to call such evidence will be seen to leave the inference that no such evidence could be found.

Note 2: Notice to Parties of Legal Issues

The hearing of this case was held on two separate days. At the end of the first session, the panel took the initiative of advising the worker's representative, the employer and the Tribunal's counsel that it was concerned about the fact that in the Case Description the horseplay issue had been characterized as simply a question of whether or not the horseplay could be considered to be "serious and wilful misconduct" under the provisions of Section 3(1)(b).

The panel felt on first impression that it was possible also to at least argue that an injury caused by horseplay would not be an injury "arising out of and in the course of the employment" within the meaning of Section 3(1). The Chairman of the panel therefore asked the parties to come to the resumption of the hearing prepared to assist the Tribunal with argument on that legal issue.

At the opening of the second day of the hearing, the worker's representative asked to have recorded her objection to the panel taking the step of asking the worker to make submissions on a legal issue. Her position, as we understood it, was that it was inappropriate for a worker to be asked to assist the Tribunal with a legal question. She indicated that it was not a problem in this actual case because of the fact that the worker was represented. However, she submitted that as a general rule such requests ought not to be made because the proceeding should be kept at a level at which a worker could participate effectively without representation. We understand that her concerns in this respect reflect concerns held generally by the Office of the Worker Adviser.

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Obviously, if a worker or an employer is prosecuting his or her appeal without representation and is not a person with skills and knowledge that would permit him or her to assist the panel with a legal question, there is a danger that sharing the panel's concern about a legal issue will serve only to confuse the proceedings. In those circumstances special efforts by the panel and by the tribunal's counsel to explain the problem in lay terms will be necessary.

Presumably, however, it would still be essential that the unrepresented worker or employer be advised of the existence of such an issue.

We do not, in any event, agree with the proposition that it is inappropriate for a panel to seek the assistance of representatives in dealing with an obvious legal issue that it sees arising in the appeal. Indeed, we think it would be fairly a matter of substantial criticism were a panel to proceed to deal with such an issue without giving representatives and parties notice of its concern and an opportunity to make submissions.

Note 3: Role of the Tribunal's Counsel

At the outset of the second day's hearing, the worker's representative also asked to have recorded her exception to the role that Mr. Starkman, the Tribunal's counsel, had played in the first day of the hearing in crossquestioning witnesses. Her position, as we understood it, was that having the Tribunal's counsel ask questions in the hearing created too adversarial and thus too intimidating an environment to be appropriate for worker appeals in compensation matters. Again, we understand that this submission reflects a general concern of the Office of the Worker Adviser.

The Tribunal considers that it has a responsibility to ensure that its panels are sufficiently informed and have evidence of sufficient quality to allow them to make, with confidence, sensible and appropriate decisions, regardless of the nature or quality of the case made by the worker or employer or their representatives. The Tribunal does not accept the proportion that it must make decisions solely on the basis of what the parties to an appeal may choose to present.

There are many reasons for this policy, not least of which is the fact that in compensation cases it is commonplace to find parties not represented - as in this case with respect to the employer - or not represented by experienced representatives, or not participating at all. It is a routine matter for appeals to this Tribunal not to be opposed by any party.

Accordingly, it is part of the Tribunal's counsel's essential role at hearings to ask witnesses any pertinent questions not asked by parties or their representatives. An example from this particular case is as follows. The worker's representative had chosen not to confront the employer's eye-witness with the substantial conflicts between his testimony to the panel under direct examination and statements he had made on a previous occasion. The employer, representing himself, appeared not to be aware of them. We can, of course, only speculate as to the worker representative's strategy. However, the witness' previous statement was part of the record and it was understandable adversarial tactics from the worker's point of view to not give the witness an opportunity at the hearing to explain the apparent conflicts, to leave the contrast between the oral testimony of the witness and the previous record to be emphasized only during argument.

In terms of the Tribunal's interest, however, it was essential that the eyewitness be confronted with those discrepancies and given an opportunity to provide any explanation that might exist. Mr. Starkman very properly performed that function for the panel. As it turned out, the conflicts were not explainable and the panel was able with confidence to give those conflicts the weight they deserved.

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Workers' Compensation Appeals Tribunal

DECISION NO. 5

Tribunal d'appel des accidents du travail

Panel Chairman: Laura Bradbury

Member: Douglas Jago

Member: Lorne Heard

LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

February 1986

Workers' Compensation Appeals Tribunal

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Workers' Compensation Appeals Tribunal

DECISION #5

THE APPEAL PROCEDURE:

The worker appeals the July 25, 1985 decision of the Workers' Compensation Board Appeals Adjudicator, Mr. L. Carr.

The appeal was heard on December 9, 1985, by a panel of the Appeals Tribunal consisting of L.J. Bradbury, Panel Chairman, D. Jago, a member of the Tribunal representative of employers, and L. Heard, a member of the Tribunal representative of workers.

The worker appeared and was represented by Mr. W. Ferguson. The employer was represented by Mrs. J. Totzke. The Tribunal was assisted by Mr. R. Nairn, a member of the Tribunal's Counsel Office, who appeared in the role of Tribunal Counsel.

The panel heard and considered evidence given under oath by the worker in oral testimony, and read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials.

These materials were marked as Exhibit "1" at the hearing.

It also read the Case Description recital of facts prepared by the Tribunal's Counsel Office and agreed to by the parties.

THE ISSUE AND HOW IT ARISES:

The worker's claim arises out of work she was doing in August, 1982 and previously. The history of her work is as follows. The worker began working for the employer in 1977. From 1979 until July, 1982 she worked in the ice-lining section of the plant packing chickens in boxes. She was then required to reach above her head when she stacked the boxes. Each box contained 15 chickens weighing approximately 2 to 3 pounds each. By July, 1982 the worker found this work too physically demanding and applied for a transfer to the chicken vacuuming section which she thought would be less strenuous work.

In this new position she vacuumed approximately 700 chickens per hour. The job required her to hold a chicken in her left hand and a vacuum, suspended from the ceiling, in her right. She would vacuum for an hour, then switch to the giblet table for half an hour and repeat this process throughout an 8-hour day.

Gradually, the worker began to notice a pain in her upper chest just below the right shoulder. On August 10, 1982, the worker found that she was unable to continue in the vacuuming job and after a conversation with the company nurse, was given what was considered lighter work in packaging giblets. However, by August 12, 1982, the pain had increased to the point where the worker was forced to lay off work completely.

The worker was diagnosed as having a right shoulder girdle sprain. She was treated by her family physician, Dr. M. Bedessee for pain and, on his advice, she attended physiotherapy.

The worker was granted temporary total disability compensation by the WCB.

On January 17, 1983, the worker returned to work. She was moved to different areas within the poultry division as needed, and worked at various times in grading, lining filets, deboning and in the turkey roll area. The worker found that the pain in her arm increased and she also developed pain in her neck following 3 days' strenuous work in the turkey roll area. She was again forced to lay-off work due to the pain. Her last day worked was March 7, 1983.

The worker was granted temporary total compensation on the basis of a recurrence in accordance with the recommendation of Dr. MacFarlane at the WCB.

X-rays taken in March, 1983, indicated that the worker had slight narrowing of the C5-6 intervertebral disc space. Dr. Lochead, a rheumatologist, felt her pain was of soft-tissue origin and that the initial localized pain in her arm had become more diffuse and her disability more prolonged. Dr. S.R. Iwan, a neurosurgeon, concurred with this.

In July, 1983, the worker left with her family for Portugal where she underwent some treatment for her condition. However, when she returned to Canada in December, 1983, it appeared to her that the treatment had had little effect.

The worker contacted the WCB and temporary total benefits were reinstated. She was seen by Dr. D.J. Daly at the WCB on March 12, 1984, who concluded there was no major residual disability but that there were significant non-organic factors. He recommended admission to the P.S.E.M. (Psychological and Social Evaluation Module).

From March 12, 1984, until April 5, 1984, the worker was assessed at the P.S.E.M. in Downsview, Ontario. While there, she was examined by Dr. Blackstone, an orthopaedic consultant, who reported that he could see no organic basis for her symptoms and gave as his opinion that her pains were related to her "unremitting voluntary muscle spasms".

The discharge diagnosis, signed by Dr. Bodasing, was right shoulder and cervical strain. He also stated that the worker had recovered from her disability, that she had no ongoing entitlement and that there would be no permanent disability. The worker was discharged on April 5, 1984, to return to regular work.

The worker did return to the employer's plant on April 16, 1984, and requested light work. Because she had been off work since March 7, 1983, the company attempted to give her lighter work in the weiner division than she had been doing in the poultry division. However, the job was classified by the employer as a regular job.

Although it appears from the evidence that there may have been lighter, or easier, work available in the plant, the worker apparently did not qualify for it on the basis of seniority. The employer also noted that the worker had been discharged from P.S.E.M. as fit to return to regular work.

Workers' Compensation Appeals Tribunal

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The worker returned to work as a taper. Her job consisted of sealing boxes on an automatic conveyor belt and replacing tape rolls, as needed. If the tape became stuck she had to stop the belt with a foot pedal, move the boxes which weighed 12 to 24 pounds each, repair the machine, replace the boxes and restart the machine. The worker had to use both arms for this job and found that the pain became unbearable. She, therefore, laid-off work on April 24, 1984.

From April 25, 1984, until January 21, 1985 when she returned to work, the worker was seen by a number of specialists on referral from her family doctor.

The worker claims to be entitled to temporary total disability compensation for the period from April 25, 1984 until January 21, 1985. The post-January 21 compensation entitlement is not an issue in this appeal. Under section 39 of the Workers' Compensation Act then in effect, a worker who was temporarily totally disabled was entitled to receive 75% of his or her average earnings so long as such disability lasts.

The Appeals Adjudicator found that the worker did not continue to be totally disabled due to the compensable disability between April 25, 1984 and January 21, 1985. The Adjudicator concluded that the worker had no continuing disability as of her date of discharge from P.S.E.M. (April 5, 1984). Since the Adjudicator relied on the P.S.E.M. finding that there was no disability at that time, and on the medical opinion that the worker's condition did not deteriorate after that date, the Adjudicator concluded that the worker was not entitled to temporary total compensation benefits for the period from April 25, 1984 to January 21, 1985.

The employer's position is that the worker was discharged from P.S.E.M. as able to return to full-time unrestricted employment and ought to have been able to do the easier work provided to her.

The issue for this panel, therefore, is whether the worker continued to be totally disabled after April 24, 1984 as a result of her disability which began in August, 1982.

Neither the parties nor the evidence raised the question of the worker's ability to perform modified work after April 5, 1984, and, therefore, the issue of partial disability was not before the panel.

THE PANEL'S REASONING:

During the hearing, the worker was questioned by members of the panel as well as by Tribunal Counsel and by the employer's representative. Submissions were made by the worker's representative, the employer's representative, and by Tribunal Counsel.

In this case, the worker suffered a right shoulder sprain in August, 1982. The disability resulting from that injury was compensated on the basis of a temporary total disability under section 39 of the Act for the period from August, 1982 to April, 1984. The period relevant to this appeal is April 25, 1984 to January 21, 1985. If the worker experienced a disability during this period and it is shown that the disability resulted from the original compensable injury, then the subsequent disability is compensable as well.

With regard to the issue of whether the worker was disabled during the period from April, 1984, to January, 1985, the panel had regard to the medical reports on file for this period. Those reports indicate conflicting evidence on this point.

There is evidence that the worker was totally disabled during the relevant period as the following medical reports indicate. First, there is a report from the family doctor, Dr. Bedessee, in October, 1984, which states his opinion that the worker is permanently disabled as far as the right shoulder girdle is concerned. Dr. Bedessee treated the worker throughout the period from August, 1982, to January, 1985. He appeared as a witness at the hearing and stated that the worker's complaints, in his view, are genuine.

Second, there is a report from Dr. Kilborn, an anaesthetist and Medical Director of the Kitchener-Waterloo Hospital who saw the worker between May and August of 1984. He felt there was a long - standing shoulder - hand syndrome, possibly related to some nerve root irritation at the C5-6 level. It was his opinion that the worker remained completely incapacitated during that period due to the neck and shoulder pain affecting the function of the right arm.

In addition to the medical reports noted above, the worker testified at the hearing that she was totally disabled. In particular, she testified that when she returned to work in April, 1984, she was required to use both arms and she performed work that involved lifting boxes weighing up to 24 lbs. The worker testified that she had increasing pain in her right arm and shoulder which made her incapable of performing the work and resulted in her layoff on April 24, 1984.

On the other hand, there is also evidence that the worker was not totally disabled in the relevant period. In particular, Dr. Turnbull, a resident in neurosurgery at University Hospital in London, Ontario, reported that he found most, if not all, of the worker's sensory abnormalities were hysterical in origin and that her problems were psychological and not organic.

As well, Dr. Carleton, a neurosurgeon, carried out a nerve conduction study and an E.M.G. in July, 1984. He gave his opinion that the studies were normal except for the slowing of sensory conduction generally in the right hand. The panel interprets this to mean that the studies were inconclusive as to the cause of the worker's disability and simply rule out denervation and motor conduction abnormalities.

The WCB surgical consultant was asked to review the reports of Drs. Carleton and Kilborn. His opinion was requested as to the worker's condition following her layoff in April, 1984. The consultant's opinion was "Do not see that further benefits indicated." The panel notes that this opinion speaks to the question of entitlement to compensation and not to the medical question of the worker's physical capacity. Also, the consultant did not examine the worker. For these reasons the panel is of the view that this report carries less weight than the other medical reports.

Workers' Compensation Appeals Tribunal

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The panel has reviewed all the evidence entered as Exhibit I as well as the additional evidence and representations presented at the hearing. The panel has concluded that the evidence for and against on the issue of total disability during the relevant period is approximately equal in weight. Therefore, the principle of the benefit of the doubt should apply and the issue should be resolved in favour of the worker. Thus, the panel concludes that the worker was totally disabled during the relevant period.

With regard to the issue of whether the disability suffered by the worker in the relevant period resulted from the 1982 right shoulder sprain, the panel notes the following. The disability suffered from April, 1984 to January, 1985 was consistent with the original injury and there was evidence that the worker had, from the date of injury in 1982, until the period relevant to this appeal, continued to complain of pain and numbness in her right shoulder and arm. In addition, she sought medical attention from her family doctor and from a number of specialists during the period for this problem. This is evidenced by the many medical reports on file. On her return to work in April, 1984, she did regular work which involved lifting boxes and she had gradually increasing pain in her right arm and shoulder. Thus, the panel is satisfied that the worker's disability in the period relevant to this appeal resulted from the 1982 injury.

DECISION:

The appeal is allowed and, accordingly, during the period from April 25, 1984 to January 21, 1985 the worker is entitled to temporary total disability compensation. The panel leaves to the WCB the calculation of the amount in question, without prejudice to the worker's right of further appeal should there be any dispute concerning that calculation.

Dated at Toronto this 3rd day of February, 1986.

Signed: Laura Bradbury, Lorne Heard, Doug Jago.

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Workers' Compensation Appeals Tribunal

DECISION NO. 6

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: L. Heard

Member: K.W. Preston



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 6

THE APPEAL PROCEDURE

The worker appeals the March 28, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, J.M. Davies.

The Appeal was heard on December 11, 1985, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, L. Heard, a member of the Tribunal representative of workers, and K.W. Preston, a member of the Tribunal representative of employers.

The worker appeared and was represented by Charles Criminisi, lawyer. The employer appeared and was represented by John Bates, vice-president of the employer company. The Tribunal was assisted by M. Faubert, a member of the Tribunal's Counsel Office, who appeared in the role of Tribunal counsel.

The Panel heard and considered oral evidence given under oath by the worker and by two other witnesses, one called by the employer and the other called by the Tribunal Counsel Office. The Panel had the benefit of Case Description Materials which were marked as an exhibit as well as the transcript from the Appeals Adjudicator hearing. Reference was also made to a report from Dr. Ricci, dated June 27, 1985, which report was also before the Hearing Panel.

Following the hearing, the Panel sought additional medical evidence and eventually received a report dated March 18, 1986, from Dr. W.J. Virgin, an orthopaedic specialist. An opportunity was afforded to the parties to make written submissions with respect to Dr. Virgin's report. Submissions were received from the worker's representative.¹

THE ISSUE AND HOW IT ARISES

The worker claims that she injured her left shoulder at work on June 6, 1984, while reaching into a box to pick up a quantity of metal rods. According to the worker, she experienced an onset of pain in her left shoulder as she was reaching into the bottom of the box. She continued to work for the balance of the shift because she believed the pain would go away. The worker indicates that she reported the incident to her supervisor the same day and on June 8, two days later, she reported to the Plant Manager. She first sought medical attention from her family doctor, Dr. Ricci, on June 12, and continued to see him on a regular basis at least throughout the months of June, July, and August, 1984.

She was able to continue at her regular employment, notwithstanding her family doctor's recommendation that she stop working. She continued to work until June 29, 1984, at which time she was laid off work on account of the closing of the plant.

¹ See Technical Note.

In upholding the decision of the Claims Review Branch, the Appeals Adjudicator noted that the worker had not described a specific unusual or accidental factor to precipitate the left shoulder disability, and also noted the delay in reporting and in seeking medical attention. The Appeals Adjudicator, therefore, concluded that the worker had not established that her disability was a result of a specific accident arising out of and in the course of her employment. That is the issue before the Appeals Tribunal.

THE PANEL'S REASONING

To be entitled to benefits under the Workers' Compensation Act, a worker must establish, on a balance of probabilities, that there was a personal injury by accident arising out of and in the course of employment. See section 3(1) of the Act.²

"Accident" is defined by section 1(1)(a) to include:

- (ii) a chance event occasioned by a physical or natural cause
- (iii) disablement arising out of and in the course of employment.

There is no statutory definition of disablement. However, the Board's Procedures Manual, Document Number 33-01-02 provides the following requirements for establishing disablement:

"Disablement arising out of and in the course of employment requires that the disablement which the worker suffers must have some causal relationship with the work being performed - that is, it is not sufficient that the disablement comes on during work, but rather there must be something about the work which can be considered to have caused the disablement to come on, such as strenuous work - awkward position - unaccustomed strain - or even a movement arising out of the work which is reasonable to consider has caused the disablement."

Was there an accident as defined by the Act? The worker told the Panel that the onset of pain occurred as she was bent over and stretching for rods. She told the Panel that when she was touching the last one down near the bottom of the box she felt pain in her left shoulder. She was specifically asked whether she had rods in her hand at the time of the onset of pain. She answered "no". A review of the relevant portions of the transcript of the Appeals Adjudicator hearing would indicate that the worker's testimony before the Appeals Adjudicator similarly described the onset of pain as occurring while she was reaching down to pick up some rods. Thus, at both the Appeals Adjudicator hearing and before this Panel, the worker recalled a specific incident which gave rise to the onset of pain.

²The pre-April 1985 Workers' Compensation Act.

In the worker's report of accident dated July 13, 1984, there is no specific incident reported. Rather, the onset of pain is described as follows:

"While picking up "rods" and laying them on the table my left shoulder became very painful. But continued to work. Pain became severe."

This is essentially the description of the injury as contained in Dr. Ricci's first report.

On another occasion, the worker was interviewed by a Board investigator on August 27, 1984, and described one specific incident as follows:

"The worker bent over to her left side to reach into the box and get a rod. She believes that the level of the rod was about one foot from the ground. As she bent over, the right foot would be off the ground as she was leaning. Using two hands, she picked the bundle of rods. As she was attempting to straighten up with the rods in her hand, she felt a very strong pain in the upper back and the left shoulder blade area. There was no radiation of pain. This "hard" pain lasted for several seconds and then subsided somewhat. She put the rods onto the table and held onto her shoulder."

Thus, within a month of the accident, the worker describes what would seem to be a gradual onset of pain on June 6, 1984, without reference to a specific incident. A month and a half later, she described the onset of pain as occurring while attempting to straighten up with rods in her hand. Latterly, her testimony to the Appeals Adjudicator and to this Tribunal also involves a specific incident, but a different one than recounted to the investigator.

Where the accident is unwitnessed, the only evidence as to how the accident occurred comes from the worker's description of the accident. If the description is inconsistent, it may cause the Panel to doubt whether the accident happened as described by the worker or, indeed, whether it happened at all. The problem is compounded where there is a delay in reporting, or a delay in seeking medical treatment, or a continuation of work after the accident.

In this case, most if not all of the compounding factors are present. In addition to an inconsistent description of the accident, the worker did not seek medical treatment for her shoulder problem until June 12, 1984, some six days after the alleged onset of pain, and was able to continue working until the plant closed some three weeks later. The worker claims the incident was reported to her supervisor on June 6, 1984. The supervisor denies this. In any event, the incident would not appear to have been sufficiently serious to cause the worker to follow-up in the reporting of the accident, even assuming it was reported to the supervisor, until some two days later. After visiting her doctor on June 12, 1984, she was able to continue her work and it would appear that she did not again complain to her supervisor or the plant manager about her shoulder problem.

In our view, the worker's evidence does not establish that the onset of pain occurred as a result of a specific incident. It was not, in the words of the Act, "a chance event occasioned by a physical or natural cause". We do, however, accept that there probably was an onset of pain on June 6, 1984. Although the worker was unable to accurately describe a specific incident, there is a consistent description of onset of pain on June 6, 1984.

Does the onset of pain constitute disablement arising out of and in the course of employment? The requirement that the disablement both arise out of and arise in the course of employment gives rise to the Board's policy that more is required than the onset of disablement during work. We agree that "there must be something about the work which can be considered to have caused the disablement to come on". Thus, there must be a causal relationship between the disablement and the nature of the work which is being claimed to have given rise to the disablement.

A difficulty in this case is proper characterization of the disablement. In non-medical terms, the worker began to feel pain in her left shoulder which she claims ultimately became so disabling that she could not continue to work. The original medical diagnosis as contained in Dr. Ricci's first report dated July 3, 1984, was "torn rotator cuff, left shoulder". However, an X-ray of the worker's left shoulder, dated July 3, 1984, describes the worker's left shoulder and cervical spine condition as follows:

"Left Shoulder. No abnormality in the bone outline, texture or density is seen. The soft tissues are unremarkable.
Cervical Spine. There is marked disc narrowing at the C6-7 level with encroachment on the bony foramina bilaterally. Degenerative lipping anteriorly at the C5-C6, C6-C7, C7-T1 levels. Pedicles and spines are intact."

The suggestion of a possible degenerative cervical condition can also be found in a more recent report of Dr. Ricci dated June 27, 1985:

"In August, 1984, I sent her for a consultation with Dr. de Villier. He also saw her again in October. His reports will be enclosed. He suggested that she may need a myelogram, even surgery. He claims the root of her problem is at the base of the neck and not her shoulder. The patient is very alarmed. She does not think this is so."

The Panel does not have the reports of Dr. de Villier to assist it in reaching a conclusion on the probable nature of the worker's injury. We do note that as of June 27, 1985, Dr. Ricci was of the view that "further investigative therapy is needed before any definitive conclusion can be reached".

Thus, the Panel is left with some uncertainty as to the probable medical cause of the worker's left shoulder disability. However, if the diagnosis of torn rotator cuff is the correct diagnosis, we do not think that the worker's job description, which involved picking up a bundle of light-weight rods weighing between 5 and 10 pounds would cause a tear in the rotator cuff. Thus, it could not reasonably be concluded that the work performed by the worker on June 6, 1984, would cause a torn rotator cuff.

The alternative diagnosis is a pre-existing degenerative cervical disease which was present in X-rays on July 3, 1984. Although it is possible that a work activity can aggravate a pre-existing degenerative condition, there is no evidence that the nature of this worker's job in fact aggravated her cervical condition. The fact that the onset of pain occurred while she was doing her normal work function is not sufficient to establish the necessary causal relationship. There must be evidence that there was something about the work that probably caused the onset of pain to come on. We note that Dr. Ricci's report of June 27, 1985, states:

"We have a lady who injured herself at work. The work seems to have been disruptive in nature and may have caused soft tissue injury or cervical disc injury. ... At the present time the patient is completely disabled. She cannot work. She is becoming very depressed and upset."

With the greatest of respect to Dr. Ricci, he does not explain his reasons for forming the opinion that the worker injured herself at work. Dr. Ricci may simply be repeating what the worker told him. Or he may be forming an opinion based on the worker's description of an onset of pain at work. In the absence of evidence which establishes on a balance of probabilities that the work activity caused the disablement, and in the presence of medical evidence which would seem to point to a non-work related degenerative cervical condition as the probable cause of this worker's onset of pain, we conclude that the worker's left shoulder disablement did not arise out of and in the course of her employment.

THE DECISION

The appeal is dismissed.

DATED at Toronto this 5th day of June, 1986.

SIGNED: J. Thomas, L. Heard, K.W. Preston.

WORKERS' COMPENSATION APPEALS TRIBUNAL
TECHNICAL NOTE

In the course of obtaining additional medical information, the Panel was advised by the Tribunal Counsel Office of certain objections raised by the worker's representative with respect to the Hearing Panel's decision to embark on a further investigation. The objection was raised on several fronts. There was a concern that the Hearing Panel was delegating its decision-making function to a physician who had not examined the worker. There was a further concern that if the Panel felt there was not enough evidence during the hearing, this matter should have been raised at the hearing so that all parties could have led further evidence on the particular point. Finally, on behalf of the worker, it was pointed out that further investigation was substantially delaying proceedings to the prejudice of the worker.

With respect to the latter point, this Panel indeed regrets and apologizes for the delay that has occurred between the hearing of the matter and the rendering of a decision. The Tribunal's objective is to resolve medical disputes with the assistance of its medical roster of Lieutenant-Governor-in-Council-appointed physicians before the hearing is commenced so that medical issues in dispute can be fully addressed by the parties at the hearing. This particular case was one of the first heard by a Panel of the Appeals Tribunal and procedures were not in place to readily permit a pre-hearing investigation.

We also agree that, wherever possible, a Hearing Panel ought to alert the parties about the need for additional evidence during the course of the hearing. Sometimes this is not possible. On occasion, it is not until the Hearing Panel caucuses at the conclusion of the hearing that the significance of certain issues crystallizes and the need for additional evidence arises. In those circumstances, we believe the Hearing Panel has a duty and an obligation to attempt to gather the evidence that is necessary to determine the issue, even if this means a delay in the rendering of a decision. Obviously, as in this case, the gathering of such information must be fully disclosed to the parties and they must be given an opportunity to respond to any additional information received by the Hearing Panel. In this case, the Panel notified all of the parties of its intention to obtain additional medical information on the issue of causation by way of a hypothetical fact situation. (It is of interest to note that it was not possible to formulate the hypothetical fact situation until the Hearing Panel had caucussed and decided which facts ought to be included in the hypothetical presented to the doctor. In situations where there is a dispute as to how the incident occurred, it will often be the case that until the Hearing Panel decides on a particular version of events, which will not occur until after the hearing, it will not be possible to obtain additional medical assistance until after the hearing.)

Upon receipt of the medical report, the parties were provided with a copy of the report and were given a full opportunity to respond in writing. The worker's representative did indeed respond and his written submissions were considered by the Hearing Panel.

On the first point raised by the worker's representative, it is incorrect to conclude that a request for an additional medical opinion on causation constitutes a delegation of decision-making responsibility. Ultimately, the determination of causation rests with the Hearing Panel. In order to make such a determination, a Hearing Panel must decide whether an accident occurred and if so, how it occurred. The Panel must also reach a conclusion as to the nature and degree of the worker's injury by considering not only the evidence of the worker and other witnesses but also by examining the medical reports diagnosing the injury. Finally, in issues of entitlement, the Panel must determine whether the injury of which the worker complains was probably caused by the accident. In many cases - i.e. a back injury caused by lifting a heavy object - the causal relationship may easily be established. In others, such as this case, in which one diagnosis is a torn rotator cuff and the description of the accident is a reaching and stretching motion, it may be helpful to the Panel to obtain some evidence with respect to the medical theories of causation of a torn rotator cuff. It is up to the Hearing Panel to apply the medical theories of causation to a particular fact situation. The mere seeking of this kind of medical assistance in no way constitutes a delegation of our decision-making authority.

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Workers' Compensation Appeals Tribunal

DECISION NO. 7

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: K. Preston

Member: N. McCombie



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #7

THE APPEAL PROCEDURE:

The worker appeals the November 15, 1984, decision of the Workers' Compensation Board Appeals Adjudicator J.I. Daley.

The appeal was heard on December 12, 1985, by a panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, K. Preston, a member of the Tribunal representative of employers, and N. McCombie, a member of the Tribunal representative of workers.

The worker appeared and was represented by Mr. R. Briggs, of the Sudbury Mine, Mill and Smelter Workers' Union, Local 598. The employer was represented by Ms. C. Comeau, from the employer company. The Tribunal was assisted by Z. Onen, a member of the Tribunal Counsel Office.

The Panel heard and considered evidence given under oath by the worker in oral testimony. The Panel also read the relevant forms, memoranda, reports, and medical reports extracted from the WCB file and collected in the Case Description materials which were marked as Exhibit "1" at the hearing. The Panel was also referred to portions of the Transcript of the proceedings before Appeals Adjudicator J.I. Daley, which Transcript was marked Exhibit "2" at the hearing. The Panel heard submissions from the employer and worker representatives and from Tribunal Counsel.

THE ISSUE AND HOW IT ARISES:

The worker first dislocated his left shoulder around Easter, 1983. There is no dispute about the fact that the initial dislocation was not work related. The dislocation happened on a Friday and the worker returned to his regular job the following Monday.

The worker again dislocated his shoulder in July, 1983, during plant shutdown. The incident that caused the second shoulder dislocation was also not work related. The worker was put in traction for several weeks and returned to his regular work after his holidays. On both occasions, the dislocations were reset by physicians.

In August or September, 1983, the worker again injured his left shoulder when he fell on it in a non-work related incident. The worker stated that on this third occasion, he pulled a muscle in his shoulder and did not dislocate it. On his doctor's advice, he took approximately 10 days off work and returned to his regular job.

Following his third injury to his shoulder, the worker was examined by Dr. T in early October, 1983. Dr. T's report of October 6, 1983, diagnosed a recurrent dislocation of his left shoulder and recommended surgical repair of the shoulder by way of a dutoid stapling.

In early November, 1983, the worker indicated that he was contacted by Dr. T's office and was advised an appointment had been made for surgical repair of the dislocated shoulder. The appointment was scheduled for November 19, 1983. The worker did not keep the appointment. According to the worker, he went to see his family doctor in November in order to make an appointment with another specialist for a second opinion as to the advisability of shoulder surgery.

On November 29, 1983, the worker again dislocated his left shoulder. On this occasion, there is no dispute that the incident was work related. He was pushing a heavy truck loaded with steel drilling rods. He immediately saw his family doctor and was placed on light duty for three days thereafter. He stopped work at the end of his December 2, 1983, shift. He saw Dr. T on December 5, 1983, and surgical repair of the shoulder dislocation was again recommended. The dutoid stapling operation was performed on January 6, 1984, to prevent future dislocations of the left shoulder. The worker was unable to return to his regular employment for several months thereafter and received total temporary benefits until March 26, 1984.

After the worker had been in receipt of WCB benefits for several months, his file was reviewed by WCB's Senior Claims and Medical Personnel. The review disclosed the presence of the previous shoulder dislocations, of which the Board apparently had not been aware in deciding to award temporary total benefits from the date of the accident to March 26, 1984. A Claims Review Branch decision of May 11, 1984, confirmed a decision of the Claims Adjudicator of April 5, 1984, which restricted total temporary benefits to a two-week period from the date of the accident to December 19, 1983, on the grounds that the incident of November 29, 1983, was an aggravation of a pre-existing, non-work related condition. It was determined by the Claims Adjudicator and confirmed by the Review Branch that the acute phase of the aggravation would not be longer than two weeks.

In upholding the decision of the Review Branch, the Appeals Adjudicator noted that it is standard Board procedure to deny compensation for surgical treatment of a shoulder dislocation where the first dislocation was not work-related.

The issue, then, on this appeal, is whether the worker is entitled to lost time arising from the surgical repair of his shoulder dislocation.

THE PANEL'S REASONING:

During the hearing, the worker was questioned under oath by his representative, by Ms. Comeau, by Tribunal Counsel, and Panel members. There is really little dispute about the facts in this case. The issue is whether the facts as contained in the Case Description and as told to us by the worker warrant entitlement to Workers' Compensation Benefits for surgical repair of the shoulder injury.

There is no doubt that the incident of November 29, 1983, aggravated a pre-existing non-work related condition. To the extent that the aggravation prevented the worker from performing his regular duties, he is entitled to compensation. Several reports in the Case Description suggest that the normal length of an acute phase following a shoulder dislocation is two weeks. We heard no evidence to the contrary on this point. It is not inconsistent with the previous lengths of time the worker was off work prior to the November 29, 1983, incident.

However, it is the worker's contention that the incident of November 29, 1983, in addition to aggravating his pre-existing condition, made it necessary for him to have a shoulder operation which resulted in the worker's inability to return to work for several months thereafter. It is for this extended period of time that the worker has claimed entitlement to compensation.

For the worker to be entitled to compensation for the recuperation period following a surgery, the worker must establish that his continuing disability during this period of time was caused by the incident of November 29, 1983. His claim, essentially, is for temporary total disability benefits following surgery. Such benefits, as provided by Section 39 of the old Act must be related to a compensable injury.

Did the need for surgery, then, arise from the incident of November 29, 1983.

Mr. Briggs, on behalf of the worker, suggested that a causal relationship could be found from the fact that the November 29, 1983, dislocation was the most serious and was caused by particularly severe and heavy straining by the worker as he attempted to move the truck filled with steel drilling rods. He indicated that the worker had not agreed to go for the previously scheduled shoulder operation because he was seeking a second opinion and therefore it could not be concluded that the previous dislocations precipitated the need for a shoulder operation in and of themselves. It was only after the work related dislocation that the need for the operation crystallized.

What troubles this Panel is that whether or not the worker had reached a conclusion in his own mind about the necessity for surgical repair, there appears to be little doubt that the specialist, to whom he ultimately turned for the surgical repair, had clearly and unequivocally concluded before the November 29 incident that surgical repair was necessary. Not only is this stated in his report of October 6, 1983, but he went so far as to schedule an appointment for the surgical repair in November, 1983, prior to the industrial incident.

Indeed, the worker told the Panel that when he saw Dr. T on December 5, 1985, the doctor asked him why he changed his mind about the operation and told him "if you had had the operation, you wouldn't be here today".

Accordingly, it is this Panel's conclusion that the need for surgical repair was clearly identified before the industrial incident of November 29, 1983, and was precipitated entirely by the series of the shoulder injuries which occurred earlier in 1983 and, none of which were work related. Where non-work related incidents have caused a condition in a worker that clearly requires surgical repair, as has been amply demonstrated in this case, we have some difficulty in seeing how a subsequent aggravation of that condition by way of an industrial incident can lead one to conclude that the need for surgery is now caused by the industrial incident. In fact, as pointed out by Ms. Comeau, and as stated by Dr. T, the worker would not have suffered the incident of November 29, 1983, if he had proceeded with the surgery as recommended by Dr. T.

During the hearing there was some discussion as to whether, in any event, the surgical repair would be properly covered under Section 23 of the Act which states

"where in any case, in the opinion of the Board, it is in the interest of the accident fund to provide a special surgical operation or special medical treatment for a worker, and the furnishing of the same by the Board is, in the opinion of the Board, the only means of avoiding heavy payment for permanent disability, the expense of such operation or treatment may be paid out of the accident fund."

We do not think this is a case in which surgical repair would "avoid heavy payment for permanent disability". We, therefore, do not think the Section applies in this case.

In his decision, Appeals Adjudicator Daley stated:

"where the first dislocation resulted from a non-industrial accident, which cannot be considered under the Workers' Compensation Act, then subsequent compensable dislocations will be accepted for the acute phase only and surgical repair will not be considered within the Workmen's entitlement".

As we understand it, Mr. Daley was attempting to state the Board's procedure with respect to treatment of surgical repair of recurrent shoulder dislocations. At the request of this Panel, Mr. Emmink of the Workers' Compensation Board kindly provided this Panel, who in turn provided the parties, with a further explanation of the Board's practice in this regard. It is our view that the practice as stated by Mr. Daley may be somewhat restrictive in that it would effectively prohibit compensation for surgical repair in all situations in which the first dislocation is not work related. There may well be cases where a subsequent dislocation is sufficiently serious on its own to have triggered the need for surgical repair. In this regard, we prefer the wording of the Practice as contained in Mr. Emmink's letter to the Appeals Tribunal of January 16, 1986.

"If a worker has a history of pre-existing, non-compensable shoulder dislocations, and sustains a further dislocation at work, entitlement is generally limited to the acute phase of the disability. In other words entitlement ceases when the worker's condition has reached the pre-accident stage. In such circumstances the Board will not authorize surgical repair of the recurrent dislocation.

On the other hand, if this further dislocation is so severe that, even after reduction, the worker continues to experience significant disability and pain, which prevents return to the pre-accident stage, surgical repair of the recurrent dislocation will be authorized by the Board, on a once only basis, in order to alleviate the disability and pain and thus return the worker to the pre-accident stage. Any complications arising out of this repair or any future dislocations attributable to it, would also be within the worker's entitlement."

In our view, the practice as stated by Mr. Emmink provides for those situations where the subsequent work related dislocation clearly triggers the need for surgical repair. Because the medical opinions in this case so clearly establish the need for surgical repair before the work related incident, we are satisfied that the November 29, 1983 incident did not create the need for surgical repair.

THE DECISION:

The appeal is denied. We believe that this will create an overpayment situation. We understand that the Board has a discretionary authority in appropriate circumstances to write off overpayments. We further note a recommendation at the end of Memo #19 in the Board file to consider writing off the overpayment. It would appear from the worker's testimony before this Tribunal that the worker was under the impression, as a result of his discussions with Workers' Compensation officials in Sudbury, that his operation would be covered under the Workers' Compensation Act. Apart from bringing this testimony to the Board's attention, we leave it to the Board to address the matter of the overpayment.

DATED at Toronto this 1st day of April, 1986

SIGNED: J. Thomas, K. Preston, N. McCombie

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Workers' Compensation Appeals Tribunal

DECISION NO. 8

Tribunal d'appel des accidents du travail

Panel Chairman: N. Catton

Member: Brian Cook

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

February 1986

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Workers' Compensation Appeals Tribunal

DECISION NO. 8

THE APPEAL PROCEDURE:

The worker appealed the decision of the Appeals Adjudicator dated April 25th, 1985, rendered by F.H. Kaliciak. The appeal was heard on December 13th, 1985 by a panel of the Appeals Tribunal consisting of N. Catton - Panel Chairman, B. Cook - a Tribunal member representative of workers and D. Mason - a Tribunal member representative of employers.

The worker appeared and was represented by his lawyer, Mr. B. Counter, The employer was represented by Mr. R. Baker, Vice-president of the Company. The Tribunal was assisted by J.M. Marshall, a member of the Tribunal's Counsel Office. The panel heard and considered evidence given under oath by the worker in oral testimony, and by the employer in oral testimony. It also read the relevant forms, memoranda, reports and medical reports, extracted from the WCB file and collected in the case description materials.

The panel also read the case description recital of the facts prepared by the Tribunal Counsel Office and agreed to by the workers' representative and the employer. Submissions were made by the worker's representative, the employer and the Tribunal Counsel.

THE ISSUE AND HOW IT ARISES:

On October 26th, 1982 the worker was assisting his employers Mr. R. Baker and Mr. S. Baker to move a 500 lb. mold, when it slipped and began to roll towards Mr. R. Baker. The worker quickly raised his left arm to the top of the mold to prevent it from moving. At that moment, his left shoulder went out of joint.

Mr. S. Baker attempted to work the shoulder back into place. He was unsuccessful and the worker was taken to Scarborough General Hospital. In the emergency department he was treated for a dislocated left shoulder, and referred to an orthopedic surgeon. The following week he saw his family doctor who advised him to remain off work for one week. Following an examination on November 1st, 1982 by Dr. Rathburn, an orthopedic specialist, surgery was scheduled for December 2nd, 1982.

Prior to this accident at work, the worker had suffered several other left shoulder problems. An incident occurred while he was playing hockey in the Spring of 1982, when the shoulder popped out of its normal position. A similar incident occurred in October 1982, again while the worker was playing hockey. On both occasions the shoulder was quickly manipulated back into place. This information was confirmed by the employer who was in attendance at both games.

The worker testified that he had suffered another displacement of the shoulder while sleeping after the incident at work. According to the evidence contained in the report of the Board's investigator, the worker stated to him that the incident while sleeping had occurred prior to October 26th, 1982. Whatever the timing of the incident, the evidence indicates that the shoulder returned to its normal position immediately.

There were no long term effects as a result of any of these non-occupational events. The worker advised the Panel that he had missed 3 days of work as a result of the incident in the Spring of 1982. The employer confirmed this. Both parties agreed that there was no modification in the worker's regular job after the hockey incidents.

Prior to the accident at work, the employee had been treated by a chiropractor. He had not seen his family doctor for this problem nor was there any indication that surgery was contemplated.

Because he was unable to continue with his normal duties after October 26th, 1982, the worker requested workers' compensation benefits. The Board accepted his claim and he was paid full benefits from October 26th until November 7th, 1982. On November 8th he returned to light duties and received temporary partial disability benefits. Temporary total disability benefits were restored from December 1st, 1982 until March 7th, 1983, during the period following surgery. The worker then returned to work.

By letter dated April 7th, 1983 the worker was advised that the Claims Review Branch had reviewed his claim and confirmed his entitlement to the benefits which had already been paid for the period ending on December 1st, 1982. These benefits were paid in recognition of the fact that the worker had suffered an aggravation of a pre-existing left shoulder problem while working on October 26th, 1982. Additional benefits were denied because the Claims Review Branch determined that the surgery was required for the underlying condition and not the compensable injury. In its decision the Claims Review Branch also implied that information concerning the previous shoulder problems had only come to light following the initial allowance of the claim. The worker was asked to reimburse the Board for the compensation received for the period December 1, 1982, to March 7, 1983.

The worker appealed this decision and the matter was considered by the Appeals Adjudicator. In his decision the Adjudicator noted the previous problems with the shoulder and accepted the advice of the Board's Surgical consultant that the surgery did not result from the accident at work. On this basis the Adjudicator denied the claim for additional benefits.

There is no doubt in this case that the worker had had problems with his left shoulder before the accident at work. Nevertheless he might still be entitled to workers' compensation benefits if it could be established that his pre-existing problems were sufficiently aggravated by his work accident to have caused the surgery. Of course, he would also be entitled to benefits for a disability that arose solely out of his work accident.

In this case the panel had to determine the most probable cause of the surgery. Was the surgery caused by the accident, the pre-existing problems or a combination of both?

THE PANEL'S REASONING:

At the hearing, the Tribunal found the worker to be credible in his testimony. We were also persuaded by the evidence given by the employer.

Workers' Compensation Appeals Tribunal

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To begin, the panel assessed the severity of both the pre-existing condition and the work accident. The panel found that the results of the accident on October 26th, 1982 differed significantly from the results of previous shoulder problems. Following the work accident, the shoulder was out of place for approximately 15 minutes. Following the hockey incidents there was an almost immediate return of the shoulder to its normal position. There is no indication that the worker was prevented from carrying out his normal duties following the non-work related events except for a 3 day lay-off. This time off work was not substantial when compared to the layoff following the accident of October 26th, 1982. Therefore in our opinion the accident at work was more severe and resulted in a more significant disability than the other incidents described.

The panel also considered the medical evidence which dealt with the possible causes of the surgery.

At the hearing the worker's representative submitted a report dated October 19th, 1983 from Dr. Rathbun. In reaching his opinion, the doctor identified and relied upon the differences between the occupational and non-occupational events. Dr. Rathbun concluded:

(the worker) is a 22 year old man who sustained numerous episodes of subluxation of his shoulder, followed by an acute episode of dislocation which occurred at work. He has undergone surgical repair which has been successful and which I would feel is not going to leave him with any sequelae by way of arthritis or further problems. Although it is true that he had episodes of subluxation prior to his work injury, I certainly felt that the injury he sustained at work was a bona fide one, and I feel that the surgery which was carried out was justified based on the dislocation alone.

There was also evidence from the surgical consultant employed by the Board who wrote in a memo dated March 21st, 1983 that:

this aggravation at work is considered to have ceased when the injured worker returned to work to wait for the surgery on December 2nd, 1982. The severity of the pre-accident condition is such that surgery would have been inevitable and the October 26th, 1982 incident was only another incident in the course of the shoulder problem. (sic)

The panel weighed the medical evidence. The evidence supporting the worker's position was offered by Dr. Rathbun who is certified in orthopedic surgery. Dr. Rathbun also had first hand knowledge of the injury obtained during an examination conducted shortly after the accident. He also had a complete and accurate understanding of the events leading to surgery. The evidence opposing the worker's claim was rendered by a doctor not certified in orthopedics who had not examined the worker. In addition, the surgical consultant did not address the differences between the occupational and non-occupational events and therefore the panel was unsure of his understanding of the events leading to the surgery.

In our opinion, considering the factors outlined above the evidence of the treating specialist is of greater weight.

In our opinion the pre-existing problems were not the sole cause of the surgery because surgery had not been mentioned prior to October 26th, 1982, nor had the worker been disabled for any significant period of time by these problems. If the surgery had been required because of a combination of the pre-existing problems and the work related injury, the worker would have entitlement to benefits. However we have accepted the evidence of Dr. Rathbun and the worker's history and find that the surgery was necessitated by the work accident alone.

We therefore find that the worker had a disability which prevented him from working after December 1st, 1982 and that disability resulted from the surgery which was required as a result of the work-related accident of October 26th, 1982. The worker is entitled to temporary total benefits from December 1st, 1982 to March 7th 1983.

DECISION:

The appeal is allowed. The direction to the worker to repay the temporary total compensation benefits which he received from December 1st, 1982 until March 7th, 1983, is hereby rescinded.

Dated at Toronto the 18th day of February, 1986.

Signed: N. Catton, B. Cook, D. Mason.

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Workers' Compensation Appeals Tribunal

DECISION NO. 9

Tribunal d'appel des accidents du travail

Panel Chairman: S.R. Ellis

Member: Brian Cook

Member: Douglas Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

February 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NUMBER 9

THE APPEAL PROCEDURE:

The worker appeals the September 15, 1982, decision of the Workers' Compensation Board Appeals Adjudicator, Mrs. N. Holsmer.

The appeal was heard on December 16, 1985, by a panel of the Appeals Tribunal consisting of S.R. Ellis, Chairman, Brian Cook, a member of the Tribunal Representative of Workers and Douglas Jago, a member of the Tribunal Representative of Employers.

The worker appeared and was represented by Ms. Anne Freed, Barrister and Solicitor. The employer elected not to appear. The Tribunal was assisted by its counsel Ms. Marsha Faubert a member of the Tribunal's Counsel Office.

The panel heard and considered the testimony of the worker given under oath and read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description materials. It also read additional medical reports filed by Ms. Freed. The Case Description recital of facts prepared by the Tribunal's counsel was read and agreed to by the worker's representative subject to certain amendments which are noted in the Case Description filed as Exhibit 1.

The worker's testimony was given in the Punjabi language and interpreted by B. Grover.

Submissions were made by the worker's representative and by the Tribunal's counsel.

THE ISSUES AND HOW THEY ARISE:

The worker is 47 years old, married with five children. In or about 1962 he was involved in a saw-mill accident in which he lost the fingers on his right hand. He is in receipt of a British Columbia Workers' Compensation permanent pension in respect of that injury.

The worker's present claim arises out of an accident at his work place on October 7, 1980. The worker was employed as a material handler. As he was lifting a tote box containing about 60 pounds of hinges onto a conveyor with a height of about 32 inches, the box caught on the side of the conveyor and struck his upper left chest region. The original diagnosis was a pulled left shoulder muscle.

Information received from the employer by the WCB indicates that after the accident the worker returned twice to the work place. He was there immediately after the accident for several days on light duty until he was laid-off because of his inability to continue due to the pain in his shoulder and chest, and he was there for one day in February, 1981, after his doctor had certified him fit for regular duty. At the hearing, the worker insisted that the only time he returned to work following the accident was for the one day in February, after his doctor certified that he was ready for regular work. Nothing of great significance turns on this discrepancy but the panel is of the view that the employer's records are likely to be more reliable than the worker's present recollection in that respect.

The worker remained off work under medical treatment until February 12, 1981. On February 9, 1981, his family physician concluded that he should return to regular duties on February 11. The worker insisted that he was still suffering from pains in his arm and chest that were exacerbated by heavy lifting and that prevented him from returning to regular duties. He did think that he would be able to perform modified duties. Nevertheless, pursuant to the instructions of his family physician, he returned to work. The date of his return was February 12, as he was ill with the flu on February 11. After attempting for a brief period of time to do the lifting that his job required, he satisfied himself that he was in fact unable to do it and requested assignment to lighter duty. However, because his doctor had certified that he was able to perform his regular work, his employer refused the light duty assignment and discharged him.

The worker testified that he has continued from that day to this to suffer from debilitating pain in his shoulders, neck and arms which is exacerbated by heavy lifting and reaching.

For about two years he looked for employment involving light work but was unable to find any and eventually, sometime in 1983, he gave up the search.

The worker eventually received full compensation for the period October 7, 1980, to February 9, 1981, based on a temporary total disability caused by the October 7, 1980, accident. This compensation was discontinued as of February 9, 1981, on the grounds that as of that date the worker had recovered from the accident.

The decision to discontinue the benefits was upheld by the Appeals Adjudicator. Medical examinations had failed to find any organic cause for the continuing condition and the Adjudicator, noting that the worker's complaints were "subjective and not supported by medical findings", concluded that the worker had recovered from the effects of the October 1980 incident by February 9, 1981. Implicit in that conclusion is the view that the worker was exaggerating or making up the symptoms.

The main issue for the panel is, therefore, whether the worker was in fact temporarily partially or totally disabled by reason of the accident for any period of time on or after February 10, 1981. If he was, then other issues concerning the quantum of compensation to which he is now entitled will obviously arise.

THE PANEL'S REASONING:

We are satisfied that at least at the time of the hearing in December, 1985, the worker was partially disabled (and possibly totally disabled) by persistent and severe pain in the arms, shoulders, and at the back of the neck, which was exacerbated by lifting and reaching.

We base that conclusion on the following evidence.

1. The worker's own testimony under oath at the hearing of this appeal.
2. The May 18, 1985, report of Peter Watson, M.D., F.R.C.P.(C), a neurologist at the University of Toronto's Irene Eleanor Smythe Pain Clinic at the Toronto General Hospital.

Arrangements for the worker's examination at the Smythe Clinic were made by the worker's solicitor in preparation for the worker's appeal. Dr. Watson examined the worker on February 21, 1985, and again on April 10.

Dr. Watson found no discernible organic cause for the worker's pain and concluded that he was suffering from a "major component of psychogenic regional pain and muscle tension pain". In his opinion the worker's pain was "real to him".

Dr. Watson was of the view that the worker was "physically capable of doing light work" although he couldn't "answer for him from a psychological point of view".

3. The Final Report of the Toronto General Hospital's Work Assessment Program in which the worker was enrolled from June 19, 1984, to August 18, 1984.

The worker had been referred to the Assessment Program by Dr. Nethercott of the Occupational Health Clinic at St. Michael's Hospital in January, 1984, as a result of arrangements made by a Ministry of Community and Social Services Vocational Rehabilitation Services Counsellor.

The Report was prepared by Occupational Therapist, D.A. Shah.

The assessment was based on the performance of the worker in three different job assignments under the Program. He worked for 5 weeks in the Hospital's Central Stores, packing test tubes and labels, rolling plastic bags in bundles of 25, reshelfing stocks and unpacking supplies. He worked for 2 weeks in the Hospital's Laundry and Linen Services, operating a thermo-patch stamping machine, sorting out clean laundry and putting tapes on adhesive tee-straps for surgical stores. He worked for one week in the Hospital's Specialty Food Shop, stocking shelves, organizing the storage area and counting packages for inventory purposes.

The Work Assessment Programme Report is based on the five-week observation of the worker doing the above work experience. The parts of the report the panel found of particular interest are as follows:

a) Motivation

- The report concludes in this respect that the worker was
- o "Well motivated toward work",
 - o "Worked steadily",
 - o "Took interest in learning new tasks",
 - o "Tried to assess his own potential", and
 - o "In spite of experiencing physical discomfort due to pain he would try his best to carry out his assignments".

b) Physical Work Tolerance

- The assessment report concludes in this respect that,
- o "Physical work tolerance was quite poor",
 - o "Standing tolerance was poor. He had to quite often sit down and carry out his work."
 - o "Due to pain in his upper extremities and along his spine and back muscles, he could not work at a stretch in a sitting position."
 - o "He always experienced nagging pain in his body."
 - o "He is limited in carrying out various kinds of jobs--that will cause physical distress, and working for a long time in the same position."
 - o "He is restricted from carrying/lifting boxes over 20/30 lbs., and he tried not to take risk by lifting heavy boxes."

c) General Comments

The Report's General Comments included the following:

- o "For him under present physical conditions it will be hard to get a suitable employment. His physical work tolerance is very poor and he will lose his job in no time."
- o "Even if he is sent for job or skills training program he would not benefit much due to physical pain that he experiences most of the time."

d) Recommendations

The Report's recommendations were as follows:

- o "It is felt that the client should not be sent for any job or skills training."
- o "He should be helped in recovering full compensation from the company where he was employed."
- o "He is not fit to carry out full days work in the labour market."
- o "Sedentary jobs, e.g., parking lot attendant, elevator operator, selling magazines/newspapers or flowers, and to a certain extent he can work in a fast food restaurant or in a grocery store behind the cash register. He could work for minimum hours - up to 4 hours a day, and should not be lifting heavy things."

4. The Report of psychologist P.S. Miller, Ph.D., C. Psych, who at the instance of the worker's solicitor saw the worker on December 9, 1985, for an evaluation of the emotional consequences of his pain problem.

It was Dr. Miller's opinion that "the worker's inability to work since the accident in 1980 clearly reflects the severity of his current pain problem and does not reflect a lack of motivation or persistence on his part." (Dr. Miller's report confirms that he was told by the worker that medical evaluation had failed to identify any organic cause for his difficulties.)

5. The December 1, 1985, report of L.J. MacNeil, D.C., Doctor of Chiropractic.

Dr. MacNeil first saw the worker on June 6, 1985, and from then to the end of September treated him on some 25 occasions. His December 1, report to the worker's solicitor is based on his observations over that period of time.

Dr. MacNeil's observations are consistent with those of Dr. Watson although he is obviously not convinced there are no organic causes. His own regime of treatment was directed to mobilizing the affected joints and consisted of massage over the thoracic spine, heat over the thoracic area and lower cervical spine and manipulation of the thoracic spine. The treatment provided the worker with brief periods of relief. However, no lasting improvement was achieved. Dr. MacNeil has referred the worker to an orthopedic specialist and that examination was pending at the time of the hearing.

Of particular interest to the panel was the fact that it was obvious from Dr. MacNeil's report that he too believed implicitly that, whatever the cause, the worker's condition of severe pain and muscle tension was a real condition.

6. The worker's history of successful recovery from serious and debilitating injuries on two occasions in the past.

In 1962, he lost all four fingers of his right hand in an industrial accident in British Columbia and thereafter made a successful return to the work force. In 1976 he was involved in an automobile accident breaking 2 or 3 ribs and again returned to the work force.

7. The fact that the worker's work history prior to the 1980 accident is that of a responsible independent person committed to supporting himself and his family.

The worker is 47 years old. He started work in 1956 at the age of 18 as a farmhand on a dairy farm in British Columbia. He left that job 2 years later to return to India. He came back to British Columbia in 1960 and found a job in 1962 with a timber company. The accident to his hand occurred 5 months later and he was unable to work for nearly two years. In 1964 he took a cleaner's job in a medical clinic. In 1965 he moved to Ontario and from 1965 to 1969 he worked as a cleaner at an Ontario Hospital. In 1969 he returned to India for a year.

After coming back to Ontario, from 1971 to 1973 he had a number of jobs. He worked as a cleaner and maintenance man at a Toronto Community Centre, as a construction worker, and as a janitor. He was laid-off from his last job when his employer lost the janitorial contract. He was unable to find work in Toronto, so he moved to Kitchener and found work with a carpet company that lasted for about 2 years.

In 1974 he moved to employment with the accident employer, and was employed there until 1978 as a punch-press operator. In 1978 the company closed the department he was working in and he was laid-off. Between 1978 and 1980 he worked for a short time as a press operator in Brampton and was laid-off again. He then worked as a security guard for about one year, until in 1980 he was recalled to employment with the accident employer where he worked until the accident 9 months later.

In the panel's view, this is a respectable work record. It is particularly impressive when one considers the special difficulties inherently presented by the fact that the worker is an unskilled person with some difficulty in communicating in English, who has virtually only one hand. It is a record that is difficult to reconcile with any propensity for malingering or exaggeration.

We have indicated that we think the worker was only partially disabled in December 1985. The worker testified at the hearing that in February, 1981, when he was sent back to work by his family physician as fit for regular work, and for a considerable period after that, he felt that he was indeed capable of performing modified or light work. However, he stated that his condition has deteriorated to the point where he now feels that he is not capable of working at all. The panel accepts that as a sincere assessment of his present condition.

However, in the light of the medical evidence set out above, the panel feels that if the worker could find an employment opportunity involving very light work it is more probable than not that he could in fact perform it. We therefore conclude that as of December, 1985, on the evidence that we have heard, it is impossible for us to be satisfied that his condition in fact constitutes total disability.

The conclusion that in December, 1985, the worker was partially disabled does not mean, of course, that that disability is compensable. For it to be compensable, we must be satisfied that the disability that existed in December, 1985, was caused by the 1980 compensable accident. And, of course, in September, 1982, the WCB Appeals Adjudicator concluded that by February 9, 1981, the worker had fully recovered from the 1980 accident.

There is no suggestion anywhere of any intervening incident that would account for the worker's condition. He has not worked since the 1980 accident. Furthermore, the evidence establishes that the worker has been actively seeking medical assistance and, indeed, has been under medical care of one doctor or another continuously since the accident. Also, the symptoms described to the various doctors have remained inherently consistent.

In the family physician's first report to the WCB following examination the day of the accident--October 7, 1980,--and further examination on October 17, the symptoms are described as a "bad pain in the left shoulder". The doctor attributed the pain to a pulled muscle. He also identified paresthesia in the 4th and 5th fingers of the left hand and pain in the left arm along the distribution of the ulnar nerve.

On October 13, 1980, the worker went to the Kitchener-Waterloo Hospital emergency room complaining of "numbness in left arm for last 2 days and nights". At the time he also described pain in his upper left arm and in the chest wall in the same area. The Doctor who saw him in the emergency room diagnosed "chest wall pain, bronchial neuralgia and osteoarthritis".

A WCB investigator interviewed the worker on December 15, 1980. The worker told him that at the time of the accident there was an immediate onset of pain in the upper left chest region but no arm, neck or hand pain. Then during that night, he awoke with a feeling of numbness in his left arm and in the middle finger of his left hand. During the next few days the numbness increased in severity to the point where on October 13 he went to the emergency department at the Hospital for treatment.

On December 15, 1980, the worker was referred by his family physician to P.H. Khare, M.D., F.R.C.P.(C), Neurologist, for a neurological evaluation. Dr. Khare's report of the worker's condition at that time--about 2 months after the accident--indicates pain in the left upper chest wall and pain and numbness in the middle and ring finger of the left hand and extending up the left arm to the anterior chest wall. The worker indicated to Doctor Khare that various physical activities increase the symptoms and that the worst part was through the night. The worker indicated at this interview as well "some stiffness and soreness of the neck muscles", and "occasional headaches". Dr. Khare indicated in his report that the symptoms were "essentially muscular in origin".

Based on that information, the WCB claims adjudicator in a report written on January 6, 1981, expressed doubt whether "the problems the worker is having with his left arm and hand are related to the original injury". He indicated that if they were found to be related then the claim should be allowed. The worker's claim at that time was for compensation for temporary total disability following the October 7, 1980, accident.

In the same report, the Claims Adjudicator noted that the worker had told the WCB that Dr. Khare had told him that he had "a problem involving a nerve in his left arm and also the left leg and all of these problems stem from the injury to the left chest area". This did not appear to be consistent with the Doctor's statement in his written report that the symptoms were "essentially muscular in origin". Accordingly, on January 15, 1981, a WCB doctor telephoned Dr. Khare for clarification and was told that in Dr. Khare's view the worker was suffering from a "transient thoracic outlet syndrome" consequent upon the trauma of the accident. Broadly speaking, this was in medical terms what in lay-terms the worker had said he had been told by Dr. Khare.

As a result, the claim for temporary total disability was approved from the date of the accident. (It was terminated on February 9, 1981, following the Family physician's conclusion that the worker was now recovered.)

It is apparent, therefore, that the WCB accepted the pain and numbness symptoms in the left hand and arm, as well as the pain in the upper chest wall, as being caused by the accident.

The involvement of the neck and right shoulder also emerged very early. As mentioned above, the worker's complaints to Dr. Khare on December 15, included stiffness and soreness in his neck. On January 16, 1981, his family physician in his progress report to the WCB reported "pain in the right rhomboids and trapezius muscles" which he attributed to a "viral respiratory infection".

In a letter to the WCB dated February 16, 1981, the family physician, who from the tone of the letter had clearly lost patience with the worker, noted: "Extensive physiotherapy seems to have achieved nothing. The patient persists in complaining about pain in both shoulders." This was based on an examination of the worker on February 12, 1981, following the worker's reported inability to lift heavy objects at the time of his return to work on February 12.

The worker at this time changed family physicians. His new doctor was Manwel Bedessee, F.R.C.S.(C), D.P.H., M.B.B.S., Durham, L.R.C.P., M.R.C.S., Eng. who specializes in Obstetrics, Gynecology and General Practice. Dr. Bedessee referred the worker for examination by orthopaedic surgeon Roger G. Stewart, on April 14, 1981. Dr. Stewart was told by the worker that since the October, 1980, accident he had "discomfort in his left shoulder, left arm, right shoulder and back of his neck".

On April 24, 1981, he was examined by Dr. P.W. Hopper of the WCB Medical Branch and Dr. Hopper reported that "...his complaint is not now of pain in the fingers or difficulty with the hand but largely with the shoulder and muscles around the neck and with discomfort in the chest."

The closure of the worker's temporary total disability benefits on February 9, 1981, was confirmed by a decision of Claims Review Branch on May 21, 1981.

The worker was seen again by Dr. Stewart on May 26, 1981. Dr. Stewart recorded "vague, nondescript pains in the anterior chest wall up into both shoulder regions...not much different from the previous consultation".

Dr. Bedessee, treated the worker regularly with acupuncture, pain pills and electric heat from February, 1981, to December, 1982. In June, 1981, he advised the WCB that the worker was "still complaining of pain in his anterior chest wall, "and stated that in his opinion the worker could do a modified job but not his regular material handling job.

In December, 1982, the worker and his family moved to Toronto so that his wife could find employment. Between February, 1982, and June, 1982, the worker was seen several times by Surje S. Sira, M.D., F.R.C.S.(C), a Surgical specialist. It is apparent from Dr. Sira's report that the worker's symptoms had not materially changed. Dr. Sira's view was that the worker's condition had plateaued and he would have to reconcile himself to returning to the work force in some modified work situation. He recommended that he be admitted to the WCB rehabilitation facility for assessment and a possible training program.

The Appeals Adjudicator Hearing was held in Toronto on May 20, 1982, and the decision issued on September 15, 1982. The Appeals Adjudicator did not accept the view of either Dr. Sira or Dr. Bedessee. She preferred the opinion of Dr. Hopper. Dr. Hopper's opinion was that "this man does not have any significant residual disablement....". Dr. Hopper based his opinion on the negative X-ray reports, the April, 1981, opinion of Dr. Stewart in which Dr. Stewart had said he "couldn't account" for the worker's generalized pain, and Dr. Hopper's own April, 1981, examination. It is clear that the Appeals Adjudicator's decision does not reflect any concern about the work relatedness of the worker's condition. Her decision was in effect that the condition did not exist.

Following the September, 1982, decision of the Appeals Adjudicator, the worker sought the assistance of Ms. Freed, the lawyer who represented him on this appeal. With his lawyer's help he was eventually referred to the physicians and institutions whose reports we reviewed at the outset of these reasons. The symptoms described in the 1984/85 reports are the same as those reported in 1981 and 1982. The worker testifies that they have remained the same throughout except that the degree of disability has gradually worsened. We are satisfied that the pain symptoms have existed continuously since the time of the accident.

It remains a fact that none of the medical examinations have ever identified any organic cause for these symptoms. They may in fact be psychogenic as Dr. Watson believes. We are, accordingly, dealing with a situation in which it would not be possible for a medical specialist to provide a concrete analysis of the probabilities of the right shoulder and back-of-the-neck pain being related to the upper left chest or left shoulder injury.

We are satisfied, given the sequence and timing of complaints, that it is more probable than not that whatever caused the continuation of the symptoms in the left upper chest, shoulder and left arm also caused the migration of those symptoms to the back of the neck, right shoulder, and right arm. We agree, therefore, with Dr. Watson's opinion that the probabilities are that the accident's physical affect of muscular tenderness, bruising and strain provoked what has become a major component of regional pain and muscle tension pain, perhaps psychogenic in nature.

We do not have to decide for purposes of this appeal whether the pain is psychogenic in origin or is caused by some undetected organic condition or is a product of some combination of the two. It is enough that we satisfy ourselves on the evidence that it is more likely than not that the pain is and always was real to the worker; that it is disabling, and that it results from the accident. We are so satisfied.

The decision that the worker has been partially disabled from February 9, 1981, when the temporary total disability compensation was discontinued, to the present time raises the further question of whether or not at any time during this period the worker could be said to have been disqualified from entitlement to full compensation under the provisions of Section 41(1)(b) of the Act.¹ By the terms of that section a partially disabled worker who does not return to work and who is not involved in a Board-approved medical or vocational rehabilitation program is only entitled to full compensation so long as he remains available for available suitable work. The worker in this case has not returned to work at any time since February 12, 1981.

On this issue we are satisfied on the basis of the worker's evidence that until a point of time in 1983 when he gave up hope of a job and stopped looking, the worker was available and looking for suitable work.

On the basis of the conclusions of the Toronto General Hospital's Work Assessment Program referred to above and on the basis of this panel's own experienced judgement, we are also satisfied that for this worker, without skills, with a low work tolerance caused by constant pain exacerbated by lifting or prolonged standing or sitting, who could not lift anything over 20 or 30 pounds and who had most of his right hand missing, it is more probable than not that throughout this period there was in fact no suitable work available to him. In our view, his abandonment of the search in 1983 represented a reasonable decision reflecting a realistic assessment of his chances.

The question of the worker's entitlement under these circumstances for the period following the undetermined point in 1983 when he gave up looking for suitable work, raises issues about the meaning of Section 41(1)(b)(ii). Section 41(1)(b)(ii) is the section which requires, as a condition of entitlement to full compensation, that a worker be available for suitable work. The section reads as follows:

41.—(1) Where temporary partial disability results from the injury, the compensation shall be ...

(b) where the worker does not return to work, a weekly payment in the same amount as would be payable if he were temporarily totally disabled, unless he ...

¹Pursuant to Section 132 of the revised Act, unless otherwise stated, all Section references are to the Section numbers as they existed prior to April 1, 1985.

(ii) fails to accept or is not available for employment, which is available and which in the opinion of the Board is suitable for his capabilities. R.S.O. 1980, c. 539, s. 41(1); 1982, c. 61, s. 2.

This panel is of the view, that where there is evidence that satisfies an adjudicator that a partially disabled worker has an honest conviction - which from an objective perspective may be seen to be substantially based - that there is no chance of finding work suitable to his or her disability, a failure to search for suitable work cannot in those circumstances demonstrate the worker's unavailability. It would require clearer words than exist in Section 41(1) to persuade us that the Legislature intended to make persistence in a pointless job search a condition of ongoing entitlement to compensation for injured workers.

The situation is complicated, however, by the fact, as previously noted, that at the time of the hearing of this appeal, the worker had concluded that his condition had developed to the point where he was no longer capable of performing any work. He did not indicate, and we did not think to ask, when he had come to that conclusion.

In 1983 he gave up looking for light work not because he thought he could not do it but because he believed there was none available to him. He was not looking but he remained available for suitable work. By the hearing date he could not be considered available for suitable work because he believed himself totally disabled. Accordingly, at some point between giving up looking in 1983 and appearing at this hearing, he moved from a position of being available for light work that he felt sure could not be found to a position of being unavailable for light work.

Because this panel is unable to conclude that the worker was in fact at the time of the hearing totally disabled, we are faced in respect of this last phase of the worker's evolving situation with the same issues under Section 41(1)(b)(ii) as are scheduled for hearing and determination pursuant to the Tribunal's decision #2.² Is a partially disabled worker who declares himself or herself to be totally disabled and therefore is in fact unavailable for any suitable work, a worker who must be deemed to be disqualified for full compensation under terms of Section 41(1)(b)(ii)? Or, for that Section to apply, must it also be shown that there was suitable work available?

It is apparent that in his own mind the worker was still available for suitable work at the time he participated in the Toronto General Hospital's Work Assessment Programme. He finished that program in August, 1984.

By April, 1985, his perception of his disability had evolved to the point where Dr. Watson was moved to express doubt as to the worker's psychological readiness to take on any work at all.

²A copy of Decision No. 2 is available from the Tribunal's office.

We doubt if there will be in fact any particular day which the worker could identify as being the point at which he became satisfied that he was no longer able to perform any work. It is a position that has gradually evolved. We think it is probable that the position had crystallized by April 10, 1985, the date of his second appointment with Dr. Watson.

Accordingly, on the issue of the worker's entitlement to full compensation for the partial disability from which we have concluded he stills suffers we make the following findings of fact.

- a) From February 12, 1981, to some point in 1983, the worker was available and actively looking for suitable light work.
- b) From that point in 1983 to April 10, 1985, he was available for light work but for reasons which viewed objectively are substantial he honestly believed he had no chance of finding any. He was available for suitable work but no longer actively looking for it.
- c) From April 10, 1985, to the present he was not available for suitable work because he believed himself totally disabled.
- d) It is more probable than not that the worker could not have found suitable work during the period April 10, 1985, to the present, even if he had been available.
- e) At no time since February 12, 1981, has there been a medical or vocational rehabilitation program for this worker of the kind contemplated by Section 41(1)(b)(i) of the Act. Accordingly, the question of his co-operation or availability in respect of such a program does not arise.

DECISION: The Appeal is allowed. The panel finds as follows:

1. The worker was temporarily, partially disabled during the period February 10, 1981, to December 16, 1985, the date of this hearing, inclusive.
2. That disability was caused by the October 7, 1980, accident and is compensable.
3. For the period February 10, 1981, to April 9, 1985, inclusive, the worker was available for any suitable work that may have been available.
4. For the period April 10, 1985, to December 16, 1985, inclusive, the panel finds that the worker was not available for suitable work, believing as he did during that period that he was totally disabled.
5. The panel does not decide as to the effect on the worker's entitlement to compensation during the April 10, 1985 to December 16, 1985, period, of that failure to be available, having regard to the absence of any available suitable work. The decision in that respect will be left to the Workers' Compensation Board for determination. The decision on the same issue in the Tribunal's Decision #2, when it becomes available, may prove to be of assistance to the Board in making that determination.

6. The case is referred to the Workers' Compensation Board for determination, based on the foregoing, of the amount of compensation payable for the period February 10, 1982, to December 16, 1985, inclusive.
7. The Tribunal would hope that any uncertainty concerning the question of disqualification for full compensation under Section 41(1)(b)(ii) for the period after April 10, 1985, that may exist while the Board awaits the decision contemplated by the Tribunal's Decision #2, would not delay determination and payment of such compensation as is not affected by any such uncertainty.
8. Given the worker's compensable partial disability as found by this panel as of December 16, 1985 - the date of the hearing - it is to be expected that the Board will re-activate the file and arrange for the compensation to which the worker will be entitled for the period following December 16. In that regard, the panel suggests that the Board review the worker's condition with a view to deciding whether or not he is currently, temporarily, partially or totally disabled. On the evidence before it, this panel has decided that he was partially disabled on December 16. However, it thinks it is not impossible that the disability is presently total and it would not want its decision to be taken as preventing the WCB from assessing the disability, post-December 16, as total. The Board may be able to secure more current medical evidence on the total disability question. The panel also believes that the Board should consider offering the worker a rehabilitation assessment program. With this decision in which the reality of his condition has been formally recognized and the doubt that was thrown on his honesty now removed, the panel feels the worker might yet be helped to find his way back into the workforce. It is also, of course, open to the Board at any time subsequent to this decision to consider a permanent pension assessment if such is indicated.

The panel apologizes to the worker and his representative for its delay in issuing this decision. In these early stages of the Appeals Tribunal's life where there are no precedents or past experience to work with, there are many things in a case of this nature that have to be considered as a matter of first impression. We regret that the process has taken longer than we expected--and promised.

TECHNICAL NOTE

The substantial delay between the Appeals Adjudicator's decision and the bringing of this appeal - nearly 3 years - was a matter of concern to this panel in its deliberations. The panel's conclusions in that regard did not, however, affect the outcome of the case. An account of the panel's concerns may be found in the Technical Appendix attached.

DATED at Toronto this 28th day of February, 1986.

SIGNED: S.R. Ellis, B. Cook, D. Jago

WORKERS' COMPENSATION APPEALS TRIBUNAL

**TECHNICAL APPENDIX
TO DECISION NO. 9**

The Problem of Delay in Bringing an Appeal

Panel Chairman:	S.R. Ellis
Member:	Brian Cook
Member:	Douglas Jago

February 20, 1986

Delay in Bringing an Appeal

The long delay in appealing this case to the final level of appeal was a matter of concern to the panel in this case. The Appeals Adjudicator decision was issued on September 15, 1982. The letter appealing that decision is dated June 11, 1985. Thirty three months elapsed between the decision and the letter of appeal.

The further 8 months between the appeal letter and this decision is explainable in part by the circumstance of the transition between the WCB Appeal Board and the new independent Appeals Tribunal. The appeal could not be scheduled for hearing by the Appeal Board prior to the end of September when it ceased to operate, and it took the new Appeals Tribunal about 2 months of organizing after it came into existence on October 1, before it could begin scheduling hearings.

It is reasonable to expect some significant period of time to elapse between the last decision in the process and the next appeal. Obviously, it may take a worker or an employer some time to seek advice about the decision and find a representative. The representative will require time to study and analyze the file and launch the appeal. Overall, however, that process should not take more than 3 or 4 months.

The Act does not specify any time limit within which an appeal may be brought. But in circumstances where the interests of the worker, the employer and of the Accident Fund are likely to be prejudiced in various ways by delay, there is clearly reason to be concerned about unreasonable delay.

In this case, for example, had the appeal been brought reasonably promptly, the WCB would have known perhaps two years earlier than is now the case that it had on its hands a long-term partial disability case. It would then have had the opportunity of bringing to bear its rehabilitation and counselling services at a time when it seems likely the chances of returning this worker to the workforce in some modified employment would have been much greater. It would also have been able to assess the stabilization of the worker's condition and to have referred him possibly a year or more ago for assessment of a permanent pension.

With the appeal delayed by about 30 months beyond what might be considered reasonable, the panel found itself dealing with a claim involving temporary compensation for a period of almost 5 years. The delay substantially short-circuited the WCB's resources for managing such injuries and minimizing their impact—resources which are in place in the interest of both the injured worker and the Accident Fund.

The panel was assured by the worker's lawyer that the delay was not the fault of the worker and the panel accepted that. The worker in this case approached his lawyer in the fall of 1982 shortly after the Appeals Adjudicator's decision. The delay was apparently caused by two things. One was the time it took for a legal aid certificate to issue. The other was the lawyer's decision to delay filing the appeal until the further medical examinations were completed. Understandably, the organization and scheduling of these further assessments took considerable time. The appeal was in fact filed shortly after the report was received from the Smythe Pain Clinic. Had the panel concluded that the worker had sat and done nothing for almost 3 years, it seems likely that it would have been influenced towards a different view as to his credibility.

The fact of delay will always be relevant on issues of credibility, continuity of complaint, etc., but in the absence of any statutory time limit for appeals, it would appear that a decision of this Tribunal cannot be modified because of an unreasonable delay in bringing a matter forward.

This note is not intended as criticism of the worker's lawyer. We understand that the delay in the issue of the legal aid certificate was beyond her control and in other respect her efforts on behalf of the worker were energetic and effective.

SIGNED: S.R. Ellis, Brian Cook, Douglas Jago, February 28, 1986.

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Workers' Compensation Appeals Tribunal

DECISION NO. 10

Tribunal d'appel des accidents du travail

Panel Chairman: Laura Bradbury

Member: Douglas Jago

Member: Brian Cook

LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

January 1986

Workers' Compensation Appeals Tribunal

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Workers' Compensation Appeals Tribunal

DECISION #10

THE APPEAL PROCEDURE

The worker appeals the decision of the Worker's Compensation Board Appeals Adjudicator, M.C. Turner, dated March 14, 1985.

The appeal was heard on December 18, 1985 by a panel of the Appeals Tribunal consisting of L.J. Bradbury, Panel Chairman, D. Jago, a member representative of employers, N. McCombie, a member representative of workers.

The worker appeared and was represented by Mr. G. Hicks. The employer sent Mr. R. Cooper to observe the proceedings but elected not to participate otherwise. The Tribunal was assisted by Mr. D. Munro who appeared on behalf of the Tribunal Counsel Office.

The panel heard and considered evidence under oath by the worker in oral testimony, and read the relevant forms, memoranda, reports and medical reports extracted from the Workers' Compensation Board file and collected in the Case Description materials. These materials were marked as Exhibit I at the hearing. It also read the Case Description recital of facts prepared by the Tribunal counsel office and agreed to by the worker's representative.

THE ISSUE AND HOW IT ARISES

The worker's claim arises out of an incident at work on May 25, 1979. The worker testified that he was working on the steering column of a car, pulling wires up from the bottom. When the wires gave way, he struck his right wrist on the dashboard of the car, which caused him considerable pain.

The worker attended immediately at the company's First Aid station. The visit is recorded in the Company's records as an occupational incident. He was treated at the First Aid station with the whirlpool bath and analgesics. A tensor bandage was applied to the wrist and when the pain subsided, the worker returned to work. There was no lost time from work, nor did the worker seek outside medical attention. Therefore, the employer did not file, nor, in the particular circumstances would it have been required to file, a report of accident with the Workers' Compensation Board.

Shortly after that incident, the worker was laid off due to a shortage of work. Between that time and 1983 he was laid off for approximately 2 1/2 years. During a brief return to work in August, 1982 the company records indicate that he received First Aid attention for his right wrist after installing a steering column. The company noted it as an occupational incident in its records.

The worker did not return to work on a regular basis until January, 1983. The WCB investigation notes indicate that the worker's supervisor was aware of the worker's right wrist problems. The supervisor indicated that over a period of eight months in 1983 the worker complained of pain in his right wrist which he related to an incident at work two to three years earlier. As a result of the wrist condition, the worker was unable to do certain jobs. The supervisor attempted to provide lighter work which did not involve heavy lifting or repetitive wrist movements.

The company records indicate that the worker was seen in First Aid on September 2, 1983 with pain in his right wrist after using a heavy gun. In his evidence given at the hearing on December 18, the worker explained that he used an 18 inch gun which weighed 8 to 10 pounds to attach six bolts below the dashboard around the steering column. There was a recoil from the gun which aggravated his wrist. The worker testified he was required to attach six bolts per car in approximately 60 cars per hour. After attending at First Aid, the worker stated he did various lighter jobs including working in the equalizer and the A/C condenser areas.

In January, 1984 the worker was once again assigned to the job of using the heavy gun and attaching bolts on the steering column. His wrist became very painful and, in addition to making 6 visits to the company's First Aid station during January, he saw Dr. Varma, his family doctor, on January 18.

Dr. Varma recommended a lighter job "so as to prevent any permanent injury". The doctor also arranged for x-rays which indicated an old fracture or non-union of the right scaphoid (wrist). Dr. Varma then referred the worker to Dr. O. Bayne, an orthopedic surgeon.

Dr. Bayne reported on February 17, 1984 that the worker "did have an established non-union through the waist of the scaphoid with cyst formation in the proximal fragment and early degenerative changes of his radiocarpal and carpal joints". Because of the worker's young age (38) and the fact that his job involved manual work, Dr. Bayne recommended that a bone grafting procedure be done by Dr. A. Gross, Chief of Orthopedic Surgery at Mount Sinai Hospital and Toronto General Hospital who has some expertise in this condition. The worker related his incident at work in 1979 to Dr. Bayne who noted it in his report.

The worker made three visits to the company First Aid station in February, 1984 and was given modified work on February 20, according to the company records. However, on March 14, 1984 the worker laid off work due to the pain in his wrist.

Meanwhile, the worker saw Dr. Gross who also recommended the bone grafting procedure. Dr. Gross wrote to the Workers' Compensation Board on March 26, 1984 and requested authorization to proceed with the operation which was then scheduled for October 29, 1984. Prior to the operation, the worker returned to Dr. Bayne. In a report dated August 4, 1984 Dr. Bayne wrote to the worker's union representative that he "...personally felt that this established non-union which presented in 1984 was a result of the injury he (the worker) sustained at work in 1979. He did complain of pain in the snuff box area in the dorsum of his wrist at the time of his initial injury. These areas of pain usually reflect a fracture of the scaphoid. It is not uncommon for fractures of the scaphoid, if not immobilized in a plaster cast to go on to an established non-union as seen here in this patient".

Workers' Compensation Appeals Tribunal

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Following the operation in October, the worker required two plaster casts, followed by several months in a splint and physiotherapy. Dr. Gross recommended that he return to work towards the end of July, 1985. The worker did in fact return to work on July 25, 1985 and has continued to perform regular work since that time.

The worker contacted the WCB and requested compensation for the time he was off work. For some reason, the WCB investigator stated that the worker did not begin the heavy work with the gun until March, 1984. Memo #12 noted "worker on light job for one year prior to seeking medical attention in January 1984. The change to the heavy job was in March 1984; three months after first medical attention was sought. Therefore, unable to establish relationship between light job he was doing and need to seek medical attention". As noted earlier, the company records do not support this statement since they indicate that the worker changed to the heavier job in January, 1984.

Dr. Teskey, a WCB surgical consultant was asked his opinion about the relationship between the 1979 incident and subsequent wrist problems. In July, 1984 Dr. Teskey wrote "agree mechanics of May 25, 1979 not compatible with (fracture of) scaphoid".

Following the Appeals Adjudicator hearing on February 6, 1985 the Adjudicator requested a further review by the surgical consultant; specifically, whether it was medically probable that the blow received in 1979 caused the fracture. On February 15, 1985 Dr. Teskey replied;

I have again reviewed this file and it is still my opinion that the injury as outlined occurring in 1979 would not produce this fracture to scaphoid. However, as no other injuries have been recorded and no previous skeletal problems recorded, I am willing to extend the benefit of the doubt to the injured worker and accept this non-union of a fractured scaphoid.

The worker claims to be entitled to full compensation after March 14, 1984 on the basis that he sustained the injury by accident on May 25, 1979 which arose out of and in the course of his employment in accordance with Section 3(1) of the Workers' Compensation Act then in effect. In the alternative, he claims that the heavy work he was doing in January, 1984 aggravated his pre-existing right wrist condition to the point where he was unable to continue working after March 14, 1984.

The Appeals Adjudicator found that, having regard for the mechanics of the accident in 1979 described by the worker, the evidence did not support a direct relationship between the diagnosed fractured scaphoid and the incident of May 25, 1979 and denied entitlement. The Adjudicator did not decide the question of aggravation.

The employer supports the worker's appeal. Mr. Cooper outlined this position to the WCB in writing and at the Appeals Adjudicator hearing. There is a letter on file from the employer, referred to at the hearing on December 18, 1985 which states: "This employee suffered a right wrist fracture May 25, 1979 but due to extensive lay-offs and only periodic discomfort he has apparently managed to continue working until required to perform a steering column support secure job in Trim Department".

The issue for this panel, therefore, is whether the worker has established his claim that the lay-off and surgery in 1984 resulted from the 1979 incident at work.

THE PANEL'S REASONING

During the hearing, the worker was questioned by members of the panel as well as by Mr. Munro from the Tribunal Counsel Office. Submissions were made by the worker's representative and by Mr. Munro.

With regard to the 1979 incident, the panel notes that although there was no medical diagnosis of the injury at the time and no lost time from work, the worker did report pain in his right wrist at the time and did receive first aid treatment for a right wrist problem. The employer identified the 1979 incident as work-related. In addition, the x-rays taken in 1984 indicated an old or "established" non-union of the right scaphoid which is the boat-shaped bone of the carpus or wrist joint. The worker's account of the incident was that he was working below the dashboard, pulling on some wires which gave way causing him to strike his right wrist.

This information, together with Dr. Bayne's opinion that the need for right wrist surgery in 1984 resulted from the 1979 injury, satisfies the panel that the worker suffered a compensable accident at work on May 25, 1979 in which he fractured his right scaphoid. The worker, therefore, meets the requirements of Section 3(1) of the Act with regard to that injury.

The second issue facing the panel is whether the worker's symptoms in 1984 and the consequent surgery resulted from the fracture in 1979. The problem of the long latency is compounded by the fact that the worker was on lay off for approximately 2 1/2 years during the period. However, the panel notes that the company records and the worker's own statements support the finding that, whenever the worker performed certain types of heavy work, his wrist condition flared up.

In 1982 the worker received treatment from the company's First Aid for right wrist pain after installing a steering column. Again, following his return to work in 1983, the WCB investigator's notes report that the worker's supervisor was aware of the worker's right wrist problems and, consequently, provided him with light work. It was not until the worker was given work requiring him to use a heavy gun in September, 1983 and January, 1984 that he began to complain more often and more strenuously of right wrist pain. The type of heavy work he was doing was noted in the company records at the time and the worker gave evidence under oath on this point at the hearing. It is unclear to the panel why the WCB believed the worker did not begin the heavier work until March, 1984. Memos #12 & #16 state that the worker changed to a heavier job in March, 1984 or, approximately 3 months after he first sought medical attention for his wrist in January, 1984. It appears that it is this confusion about the time the worker began work with the heavy gun and the time he sought medical attention or complained, that may account for Dr. Teskey's opinion that the heavy work had not aggravated the worker's wrist problem.

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This panel accepts as a fact that the worker was performing work with a heavy gun on September 2, 1983 and again in January, 1984. It was this work which caused him pain in his right wrist and led to his attendance at First Aid. The panel further accepts that the performance of this heavy work aggravated the worker's compensable right wrist problem. The panel also accepts the worker's sworn testimony that he did not suffer any other injuries between 1979 and 1984. Dr. Teskey's report of February 15, 1984 in which he noted that there were no other injuries recorded between 1979 and 1984 and no previous skeletal problems supports the worker's statement. The panel is of the view that the change to heavier work accounted for the 1984 problems which resulted in lay-off from work after March 14, 1984 and surgery in October, 1984.

DECISION

The appeal is allowed. The panel finds that the May 25, 1979 accident at work caused the fracture of the worker's right scaphoid. The disability resulting from the fracture arose when the worker performed heavier work in 1984.

We conclude that the disability suffered by the worker in the period from his lay-off in March, 1984 until his subsequent return to regular employment resulted from the wrist fracture caused by the May 25, 1979 accident. It is, therefore, compensable.

The panel leaves to the Board the determination of such compensation, without prejudice to the worker's right of further appeal should there be any dispute arising from the determination.

Dated at TORONTO this 27th day of January, 1986.

Signed by: Laura Bradbury, Douglas Jago, Nick McCombie.

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Workers' Compensation Appeals Tribunal

DECISION NO. 11

Tribunal d'appel des accidents du travail

Panel Chairman: S. R. Ellis

Member: Lorne Heard

Member: Douglas Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

February 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 11

THE APPEAL PROCEDURE:

The worker appeals the March 27, 1985, decision of the Workers' Compensation Board's Appeals Adjudicator, Mr. S. Rudderham.

The appeal was heard on December 19, 1985, by a panel of the Appeals Tribunal consisting of S.R. Ellis, Chairman, Lorne Heard a Tribunal member representative of workers, and Douglas Jago a Tribunal member representative of employers.

The worker appeared and was represented by Mr. Lincoln Brown, a member of the Office of the Worker Adviser. The employer also appeared. The employer is a limited company and appeared in the person of its President. It was represented by Mr. Thomas Carrol a member of the Office of the Employer Adviser. The panel was assisted by its counsel Ms. Zeynep Onen, a member of the Tribunal's Counsel Office.

The worker testified in the Italian language through an interpreter, Ms. Nadia Pasquali, who also assisted him with understanding the proceedings and the submissions.

The panel heard and considered the testimony under oath of the worker and of the President of the employer company and has read and considered the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials filed at the hearing. Filed separately at the Hearing were a December 18, 1985, medical report from the worker's family physician; a June 6, 1985, report to the family physician from Ensor E. Transfeldt, M.D., F.R.C.S.(C); a May 17, 1984, report to the family physician from Giuseppe D'Agata, M.D., D. Psych., F.R.C.P.(C), and a copy of the original Employer's Report of the accident. All of these have been carefully considered. The panel has also read the Case Description recital of facts prepared by the Tribunal's counsel and agreed to by the parties. Oral submissions were made by both parties' representatives and by the Tribunal's counsel.

THE ISSUE AND HOW IT ARISES:

The worker's claim arises out of an accident at work on September 17, 1982. The worker fell from a 12 foot ladder and injured his neck, right hip and back. During the hearing some questions were asked by the employer's representative which tended to suggest that the employer was challenging the occurrence of the accident. Mr. Carrol subsequently made it clear that that was not the case as far as these proceedings were concerned. In this decision the panel has taken it to be an undisputed fact that the accident occurred as described by the worker.

The worker received temporary total disability benefits until November 12, 1984. The benefits were discontinued as of that date on the grounds that the worker was then fit to return to his regular employment. The worker's position is that he continued to be totally disabled after November 12 and up to the present time. The worker's representative also invited the panel, if it finds the worker not totally disabled, to consider whether he may have been partially disabled during any period since November 12.

The Appeals Adjudicator explains his decision on the basis of his finding that the extensive medical investigation had disclosed no organic basis for the worker's symptoms. The decision's implications, however, are more extensive.

Medical literature attests to the acceptance by the medical profession of the fact that it is not uncommon for there to exist pain or muscle spasm that is real and disabling and for which no organic cause can be found. Often it is seen to be rooted in a post-traumatic psychological reaction that produces physiological effects, but there is also recognition that the origins of pain are not fully understood and that there is real pain that has no organic source that can be discovered and yet is not explainable in terms of psychological reaction as that concept is normally understood.

The evidence considered by the Appeals Adjudicator included reports of the investigations by the WCB's Psychological Social Evaluation Module (PSEM) and the assessments of psychiatrists, all of which were devoted to exploring the possibility of a post-traumatic psychological reaction as a cause of the worker's symptoms. In the result, it is apparent that while the Appeals Adjudicator explains his decision on the basis of their being no organic basis for the worker's symptoms, he in fact has implicitly accepted the results of the PSEM assessment and other psychiatric assessments as disclosing no psychological explanation for the symptoms and must be taken, therefore, to have concluded that the worker is exaggerating or misrepresenting his symptoms.

The main issues for this panel are,

- (a) Was the Appeals Adjudicator correct in his assessment of the medical evidence as disclosing no organic cause for the worker's symptoms?
- (b) If so, are the symptoms nevertheless real to the worker and actually disabling notwithstanding the failure to find an organic cause to which they may be attributed?

In respect of issue (b), if we were to find in favour of the worker it would be on the basis that the symptoms had undetectable organic origins or were caused by a post-traumatic psychophysiological reaction, or some combination of the two. Such a finding would be wholly dependent on the worker's subjective evidence concerning his symptoms. Thus another major issue in this case is whether or not the panel has the confidence in the worker's credibility that would allow it to make a finding of disability in the face of no medical evidence of an objective nature.

THE PANEL'S REASONING:

After carefully reviewing all the medical reports, the panel has no difficulty in agreeing with the Appeals Adjudicator that there is no evidence of an organic cause for the disability claimed. The conclusion that there is no discernible physical basis for the disability complained of is well supported by the medical evidence. The WCB Rehabilitation Centre in its discharge report indicated that in the opinion of the Centre the worker is at the present time totally disabled but that this is "largely functional". It suggested that he be readmitted under the Psychological Social Evaluation Module. Donald J. Currie, M.D., M.Sc., F.R.C.S.E., F.R.C.S.(C), D.S., F.A.C.S., who examined the worker at the worker's request in January, 1984, reported to the WCB that he had found "no objective signs".

In October, 1984, G.D. Kay, M.D., F.R.C.S.(C), the WCB's orthopaedic consultant found "no overt spasm"..."excellent lumbar flexion demonstrated on the examination table". Dr. Kay reports that X-rays showed "only mild anterior vertebral body tipping and an occasional upper small Schmorl's node". Dr. Kay felt that the predominant picture was that of psychogenic illness but recommended a CT scan to "rule out the faint possibility of underlying organic pathology". The CT scan was conducted and it was normal.

J.D. Shortt, M.D., F.R.C.S.(C), a specialist to whom the worker was sent in November, 1984, by his family physician could find no objective symptoms and suggested that a CT scan be considered. (He was not aware that a CT scan had already been performed.) In January, 1985, Dr. H.J. Grossman of the WCB talked to Dr. Shortt and following that conversation concluded that "we are at the stage where the PSEM discharge recommendation is supported organically and non-organically".

In April, 1985, the worker was sent again by the family physician to Dr. Currie. Dr. Currie recorded the complaints of pain including pain in the area of the old hernia operation. He could find no cause for pain in the hernia area and in respect to the back pain indicated to the family physician that he had set up an appointment with Ensor E. Transfeldt, M.D., F.R.C.S.(C), an orthopaedic surgeon at St. Michael's Hospital.

In June, 1985, the X-ray report to Dr. Transfeldt indicated "minimal osteophytes at L3-L4, however, the disc spaces are well preserved and the examination is otherwise normal." Dr. Transfeldt's assessment was:

"this patient appears to be suffering from mechanical type low back pain".

The worker's family physician does continue to report that the worker is suffering disabling back pain but is unable to provide any significant objective evidence of an organic explanation.

As noted previously, however, the conclusion that there is no apparent physical explanation for the symptoms of pain and muscle spasm, cannot determine the matter. A person can suffer disabling pain that is real to him or her which has undetectable physical origins or is the product of a post-traumatic psychological reaction, or some combination thereof. The panel considered whether this is such a case.

The testimony of the worker at the hearing concerned not only the injuries suffered in the fall from the ladder on September 17, 1982, but also injuries he suffered in an accident in July, 1981, while employed by a different employer. The injuries arising from the July, 1981, accident were a hernia and a lower back problem and those injuries became a subject of interest in the current proceedings because the major problem of which the worker complains arising from the September, 1982, accident is also a lower back problem. Accordingly, much of the questioning of the worker by the employer's representative was focussed on exploring the extent to which the worker's back condition was related to the first accident.

There are substantial inconsistencies and conflicts in the worker's reporting of his symptoms. It is clear from both the worker and the employer's evidence at this hearing that when the worker went to work for the employer at the beginning of June, 1982, he was in good physical condition and his back was not a problem. The accident employer was a general construction firm. The worker testified that while working for the accident employer, prior to falling off the ladder he "felt good" that he had "no problem with the back". He worked, he testified, as a general labourer, lifting and carrying very heavy materials such as railroad ties, laying concrete blocks, wheeling barrows of cement, etc. This heavy labouring work went on without difficulty or complaint from the beginning of June, 1982, to the accident on September 17, 1982.

The employer testified that the worker displayed no signs of any physical difficulties throughout this period and spoke of none. This evidence is consistent with the worker's own evidence referred to above. It is also consistent with evidence given by the worker to the Appeals Adjudicator to the same effect.

The evidence that the worker was in good physical condition prior to the September, 1982, accident supports the view that any disability that he has, was caused by that accident. As it turns out, however, it is evidence that is also of particular interest on the question of whether or not the panel has reason to be confident in the reliability of the worker's description of his symptoms.

The proceedings at the WCB concerning the worker's claim for compensation arising out of the July, 1981, accident overlapped his June, 1982, return to the workforce with the accident employer in this case. The statements he made to various WCB officials and Doctors in support of that prior claim during that overlapping period contrast unfavourably with the evidence referred to above. The following instances are particularly troubling:

- o At the end of April, 1982, approximately 4 weeks before reporting to work in "good condition" with the accident employer, he is reported in a WCB interview memorandum to have indicated to a WCB Officer that because of both his hernia and back condition he was unable to "lift anything" and could not return to his former occupation of heavy lifting.

- o In the middle of July, 1982, - 6 weeks after his return to full-time heavy labouring work - he was examined by his family doctor. In a report to the WCB of that examination, the family doctor advised that the worker was "still feeling pain in his back and right inguinal (i.e. hernia) area" and being "unable to stand too long or to do any lifting." The worker gave his family doctor that day the impression that he was "still disabled". That report was made at a time when the worker was appealing the discontinuation of his compensation benefits in respect of the July, 1981, accident but, as mentioned, also while he was working steadily without difficulty on a heavy labouring job with his new employer.
- o Three days after his mid-July, 1982, examination by his family physician, and while, as he told this panel, he was in "good condition" and had been working full-time in heavy construction for about 7 weeks, he was examined by Dr. Grossman of the WCB medical staff. Dr. Grossman reported that "he is quite adamant about being unable to do his regular work and considers himself totally disabled ... he returned to work about 3 weeks ago but indicates ... he is unable to do a full weeks work."
- o On the same day, in July, 1982, that he was seen by Dr. Grossman, the worker appeared at the Appeals Adjudicator hearing of his appeal related to the July, 1981, accident. The Appeals Adjudicator in his decision on that appeal notes that the worker originally testified to the Appeals Adjudicator that he had not returned to work and had received no income since April 26 when the compensation was discontinued. It was only after his fiancee also testified about his condition and apparently indicated that he was currently employed and receiving income that he then confirmed that he was indeed working with the present employer. He told the Appeals Adjudicator, however, that he was "doing some interior plastering and cleaning; that he can only work 2 or 3 days a week and was not physically able to work more". On the evidence before, us that was a misleading description of his condition and of the work he was doing for the accident employer at that time.
- o On August 18, 1983, at a time that he had been doing heavy labouring work regularly for the present employer for 2 1/2 months and--according to his evidence to this panel--had experienced no difficulty with his back, he told the Appeal Board that financial reasons had forced him to return to work in June, 1982, even though he was not well. He indicated that in his view it was returning to work too early that caused the accident in September.

On the basis of the foregoing conflicts in the worker's evidence and on the basis of the panel's assessment of the worker's testimony at the Appeals Hearing, the panel has come to the conclusion that this worker's statements about the nature and severity of his symptoms cannot be relied upon.

Our conclusion that the worker's description of his symptoms cannot be trusted is also consistent with the impression the worker left with most of the doctors who examined him. Consider the following:

- o In April, 1982, one of the specialists in a report to his family doctor expressed the following opinion:

"it looks to me as if (the worker) is tired of the construction of swimming pools and would like to make a settlement with the WCB and get on with some light work elsewhere."

- o In the same month in a report of an examination by a doctor at the WCB the following appears:

"he complained of pain in right hernia area when asked to move right hip. When distracted, he was able to move the right hip freely without complaint or problem."

- o In the report of another doctor to the family physician in May, 1983, the worker is reported as denying any trouble with his back in the past. Yet at other times he has been very clear about the injury to his back caused by the 1981 accident.

- o In September, 1983, the discharge report prepared by the Rehabilitation Centre indicates that "all team members found him to be grossly exaggerating his complaints and quite unwilling to participate in even the slightest of programs."

- o In January, 1984, a specialist report to the WCB contained the following:

"I find no objective signs. I think he probably has some continuing discomfort but I am not sure it is as bad as he claims."

- o In a September, 1984, social work report the worker is reported to be "minimally co-operative, guarded and offered no information on his own."

- o In October, 1984, a WCB psychiatrist conducting a psychiatric consultation of the worker found that the patient was quite pleasant, good humoured, gave no indication of distress either physical or emotional during the interview, he also reported that "he has a peculiar gait, which was considerably more pronounced following the interview than it had been before".

- o That psychiatrist also noticed the inconsistency between the worker describing the fact that he experienced a shortened duration of sleep because of pain but also claiming to be painless when he first awakens. The psychiatrist found that "the inconsistency of his reporting is striking".

- o In an October, 1984, report from an orthopaedic consultation at the PSEM the specialist reported "only a few degrees of flexion are permitted ... but when sitting on the examination table excellent lumbar flexion was demonstrated".

We hasten to say that taken individually inconsistencies between what is reported by a particular doctor as compared to what is said elsewhere or is known to be true have to be considered with some caution. They are hearsay statements and busy practitioners may not always understand what is said to them, or report it accurately, etc. But in this case, taken together, they present a picture that is consistent with the panel's own impression: that of a worker who is prone to exaggerate or misrepresent his symptoms.

A demonstrated inclination to exaggerate or misrepresent the situation when a worker perceives it to be in his own interest to do so does not mean of course that the worker is in fact necessarily free of real symptoms. He or she may resort to misrepresentation and exaggeration as a tactic in the struggle to gain the authorities' recognition that there is a real problem. And there is some objective evidence of the existence of some kind of a real problem in this case which should be noted.

At the time of his admission to the WCB's Rehabilitation Centre, the WCB doctors in their admission report identified the existence of "marked muscle spasm", and markedly tight paravertebral muscles. It was also noted that "the patient is anesthetic to sensation over the entire right side of his body." In the September 12, 1983, discharge report Dr. J.D. Haynes refers to "very little physical findings other than the massive back spasm...". In the discharge report Dr. Haynes recommended that the worker be admitted to the PSEM for assessment. The referral to the PSEM was recommended because in the opinion of Dr. Haynes and the Centre's staff, the worker displayed a "functional overlay" that could "perhaps be described as conversion hysteria".

The admission to the PSEM was cancelled because the worker reported that he felt totally disabled and unable to cope with another assessment program. However, the possibility of having him admitted to the PSEM was reconsidered by the WCB on August 24, 1984, and the assessment based on examination at that time reported a "very noticeable spasm in the bi-lateral lumbar and lower thorasic paravertebral muscles." The report also again notes the absence of sensation to pin prick "along the entire lower leg...". The conclusion was to admit the worker to the PSEM program.

The PSEM admission report indicated that examination at that time (September 25, 1984) disclosed no paravertebral muscle spasm but did indicate "non-anatomical sensory changes affecting the entire right leg". Dr. Transfeldt's report of June 6, 1985, assessed the worker as having mechanical low back pain.

Ultimately, however, the panel is satisfied that notwithstanding the views of the worker's family physician, and Dr. Transfeldt, the weight of the medical evidence clearly supports the conclusion that there is no ongoing disability. In May, 1984, Giuseppe D'Agata, M.D., D. Psych., F.R.C.P.(C), to whom the worker had been referred by the family physician, concluded that there was no evidence of mental illness which might justify the complaints, and that any compensation "will have to be based on organic findings". The conclusion of the PSEM after an assessment that lasted from September 25, 1984, to October 11, 1984, and which included psychiatric consultation was that the worker had in fact recovered from the injury he sustained in September of 1982 and was now fit to re-enter the workforce. The medical opinions supporting the existence of no discernible physical causes have been previously mentioned.

Given the demonstrated unreliability of the worker in reporting symptoms, the absence of objective medical evidence, and the weight of the medical opinion in favour of the view that there is no ongoing disability, this panel can come to no other conclusion than that at least by November 12, 1984, the worker had recovered from the injury sustained in the September, 1982, accident.

DECISION:

The appeal is denied.

DATED at Toronto, Ontario, February 20, 1986.

SIGNED: S.R. Ellis, L. Heard, D. Jago.

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Workers' Compensation Appeals Tribunal

DECISION NO. 13

Tribunal d'appel des accidents du travail

Panel Chairman: N. Catton

Member: N. McCombie

Member: D. Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

February 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NUMBER 13

THE APPEAL PROCEDURE:

The worker appealed the decision of Mr. J. D'Andrea, Appeals Adjudicator, dated April 5, 1985. The appeal was heard on January 6, 1986, by a panel of the Appeals Tribunal consisting of N. Catton, Panel Chairman, N. McCombie, a Tribunal member representative of workers, and D. Jago, a Tribunal member representative of employers.

The worker appeared and was represented by Mr. E. Pukitis of the WCB Workers' Advisers Office. The employer was notified of the proceedings but chose not to participate. The Panel was assisted by Mr. E. Grisolia, a member of the Tribunal Counsel Office.

The Panel heard and considered evidence, given under oath, by the worker in oral testimony. It also read the relevant forms, memoranda, and reports extracted from the WCB file and collected in the Case Description materials. In addition, the Panel considered the WCB guidelines for the adjudication of claims involving pre-existing conditions and the application of Second Injury and Enhancement Fund. These documents were marked as Exhibit Number 2 at the hearing. The panel also read the Case Description recital of the facts prepared by the Tribunal Counsel Office and agreed to by the worker's representative. Submissions were made by Mr. Pukitis and Tribunal Counsel.

ISSUE AND HOW IT ARISES

On December 8, 1982, the worker was working at a filing cabinet that sat on the top of a bookshelf. The cabinet, which weighed between 300 - 500 pounds, began to move. The worker attempted to stop it from falling, but could not because of its weight. The edge of the drawer hit the worker on her chest, tearing her sweater above her right breast and below the waist. The cabinet landed on her thighs. Most of the weight appears to have been concentrated on the left side of her body. The cabinet pinned her against a desk. The desk slid backwards and was stopped by an electrical outlet in the floor. Co-workers had to lift the cabinet and free the worker.

The worker left work immediately and was treated at Toronto General Hospital. The examining doctor noticed redness and tenderness of the right breast area and bruising on the left thigh area. There appeared to be a good range of movement and the doctor recommended that she return to work.

Despite persisting pain, swelling, and bruising particularly in the upper legs the worker resumed her clerical position. Because of the ongoing symptoms the worker attended a physician for acupuncture treatments. These treatments are not documented in the medical reports available to the Panel.

The worker's physical condition gradually deteriorated after the accident. She developed a pronounced limp and her ability to walk was significantly impaired. This deterioration was confirmed by the worker's supervisors when they were interviewed by the investigator employed by the Board.

In April of 1983, the worker attended her family physician who had X-rays taken. These X-rays revealed relatively advanced osteoarthritis, in both hips. Anti-inflammatory medication was prescribed but it was of no benefit. The family physician referred the worker to a rheumatologist who excluded the possibility of rheumatoid arthritis. According to the family doctor, the worker had suffered from arthritic problems in her feet prior to the accident at work but there had been no complaints of pain in the hip region.

In March 1984, the employer declined to renew the worker's contract. Her job might have required her to be involved with physically aggressive individuals. Because of her physical condition, the employer was concerned that she would not be able to function if an altercation took place.

In February 1984, the worker's family physician referred her to Dr. G.R. French for an orthopedic consultation. The orthopedic specialist recommended and eventually carried out a complete replacement of the left hip. This surgery took place in April 1984. After recovering from the left hip surgery the worker underwent the same surgery for the right hip. The worker testified that both surgeries had been successful.

In the spring of 1984 the worker requested workers' compensation benefits. In her opinion, the loss of her job was directly attributable to her physical limitations which were in turn attributable to the accident at work. In support of her claim the worker submitted a number of reports from her family physician. In one report he stated in part:

"I can quite honestly state that this lady was having no problems related to her hip prior to the accident. While it is obvious that her osteoarthritic process has been of a mildly chronic nature, I am certain that this injury has caused an exacerbation of the condition with subsequent loss of her job and subsequent surgery."

Before deciding on further entitlement the Board had an investigator contact co-workers, supervisors, and the treating physicians. It also obtained an opinion on the possible relationship from Dr. Teskey. Dr. Teskey stated:

"Noting description of accident I find it difficult to accept injury to both hips. Bruising of the left thigh above knee should not affect the hip joints. Recommend to deny."

The claim was also considered by Dr. Dowd, Director of Medical Services, who also recommended that the claim be denied. Based on this medical evidence Mr. Grant, the Claims Review Specialist, denied the claim. In his opinion, the development of osteoarthritis in the hips could not be attributable to the accident at work.

The worker appealed this decision. In support of her claim she provided the Board with a report from the orthopaedic surgeon, Dr. French. In his report dated February 20, 1985 he wrote:

"Although I don't think we can blame the development of the osteoarthritis on her accident, I think we can certainly say that there was a definite relationship between the accident and the onset of symptoms. On this basis, I think that she should be compensated."

The Appeals Adjudicator referred this report to Dr. Dowd prior to making a decision and requested further opinion. In his response, Dr. Dowd indicated that the delay in the onset of symptoms between December 1982 and April 1983 was too long to consider a relationship.

The Appeals Adjudicator in his decision accepted the opinion of the Dr. Dowd and found that a relationship between the bilateral hip problem and the accident at work could not be established. The claim for benefits was therefore denied.

The worker is requesting the Tribunal grant her entitlement to benefits for the period following her lay-off from work on March 23, 1984 until May 1985 at which time she had sufficiently recovered from her hip replacements to resume work.

In order to be entitled to benefits under the Act, the worker must establish that the disability she suffered and the surgery she underwent in 1984 resulted from the injury caused by the accident at work in December, 1982.

In addition to considering the Act, the Panel also considered the Board's guidelines concerning the adjudication of claims involving pre-existing conditions. The guideline indicates that when there is a pre-existing condition and the worker is symptom free at the time of the compensable accident, there should be no limitation on the benefits paid during the period of temporary disability.

Because there is no dispute that there was a work-related accident and there is no disagreement about the existence of the pre-existing condition, the only issue before the Panel is the degree to which, if any, the pre-existing condition was aggravated by the accident at work. If the worker had returned to her pre-accident state prior to the surgery in April 1984, she would not likely be entitled to compensation. If, on the other hand the accident accelerated or aggravated the pre-existing condition and the surgery was performed as a result, she would be entitled to temporary disability benefits under the Act.

THE PANEL'S REASONING

The Panel found the worker to be straight forward and honest in her recitation of the facts. In our opinion, the worker suffered a significant deterioration in her physical condition following the accident at work, in December 1982. This change in physical condition was apparent immediately following the accident and there was no indication that it improved prior to the surgery in April 1984. The worker found it more difficult to walk, climb stairs, and carry out normal duties. These findings of greater physical limitations following the accident are supported not only by the worker's statements but also by the evidence of the co-workers, supervisors, and family physician.

There is no disagreement that her physical limitations were in large part caused by the arthritic condition in both hips. According to the results of X-rays this pre-existing condition was advanced. However, there is no evidence that this worker had any symptoms of osteoarthritis in the hips until after the accident. Both the family physician and the orthopaedic surgeon, Dr. French, acknowledge that the accident as described probably aggravated an underlying condition to the point where symptoms were disabling.

On the other hand the Board's physicians could not accept that the hip joints had been affected by the accident. Their opinions appear to have been primarily based on the fact that the thighs were bruised following the accident and that there was a lack of direct trauma to the hips.

In the Panel's opinion this was a very narrow assessment of the accident. When such a heavy filing cabinet comes to rest on the thighs, it is likely to also put pressure on the entire area above the thighs. It is also apparent to the Panel that the worker's hips would have been affected while she was pinned against the desk.

The events following the accident also indicate that the accident did, in fact, affect the hips. There was a marked and immediate onset of symptoms in both hips following the accident. Although the worker continued working, because of the onset of symptoms she sought medical attention soon after the accident. As time passed the symptoms became more severe.

There is no dispute that osteoarthritis is a chronic condition that may become disabling without trauma or any other triggering event. However, the sequence of events in this case is such that it is unlikely that the worker's disability resulted from the normal progression of osteoarthritis. In the Panel's opinion, the worker did not return to her pre-accident state at any time following the accident. Instead, the accident accelerated the onset of her disability.

While the worker eventually might have required surgery for the underlying condition, even if the accident had not occurred, the accident at work did accelerate the onset of symptoms and in turn created the need for surgery in 1984. We, therefore, find that the worker's surgery on both hips and her disability during this period resulted from the injury caused by the accident at work in December 1982.

DECISION

The appeal is allowed. The Workers' Compensation Board is directed to calculate the temporary benefits that are payable to the worker during the period of lost time from work, required by the surgery and the subsequent recuperative period. The Board is also directed to consider and award any other benefits that may be payable under the Act.

DATED at Toronto this 24th day of February ,1986.

SIGNED: N. Catton, N. McCombie, D. Jago

Workers' Compensation Appeals Tribunal

DECISION NO. 14

Tribunal d'appel des accidents du travail

Panel Chairman: L.J. Bradbury

Member: D.C. Mason

Member: L. Heard



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

February 1986

Workers' Compensation Appeals Tribunal

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Workers' Compensation Appeals Tribunal

DECISION NO. 14

THE APPEAL PROCEDURE:

The worker appeals the April 12, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, Mr. W.A. Paavola.

The appeal was heard on January 7, 1986, by a panel of the Appeals Tribunal consisting of L.J. Bradbury, Panel Chairman, D. Mason, a member of the Tribunal representative of employers, and L. Heard, a member of the Tribunal representative of workers.

The worker appeared and was represented by Ms. E. Widner from Central Toronto Community Legal Clinic. An Italian interpreter was present to assist the worker. The employer was represented by Mr. W.L. Watt, Manager of Personnel and Labour Relations. The Tribunal was assisted by Ms. M. Faubert, a member of the Tribunal Counsel Office, who appeared in the role of Tribunal Counsel.

The panel heard and considered evidence given under oath by the worker and by Mr. Watt in oral testimony and read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description materials.

THE ISSUE AND HOW IT ARISES:

The worker's claim arises out of an incident at work on October 21, 1983. The worker, who was employed since 1976 with the same employer, was performing work in the stock room. She worked in an isolated area at one end of the room, opposite an internal security door. This door was kept locked at all times and could be opened only with a key obtained from the foreman. Use of the door was restricted to certain specified employees. When the door was opened an alarm sounded automatically in the stockroom as well as in the foreman's area.

The worker testified that she had worked in the stockroom for about one month during which time the alarm had never sounded. The employer stated in a letter to WCB that the worker had worked in the stockroom for 3 months. Further, Mr. Watt testified that employees used the door occasionally, once or twice a week, to obtain stock items for the production area and that the alarm sounded at these times.

In any event, the worker and the employer agreed that the door normally used by employees, and for moving stock in and out, was located at the far end of the room from where the worker sat.

On the day in question, Friday, October 21, the worker was working near the locked security door. She was bending down to put some items in a box, when she was startled by a person suddenly appearing in the doorway and the alarm ringing. At the same time, the worker screamed and fainted. She was shaken by the incident, and lost her voice immediately following the incident.

The worker's evidence at the hearing was that it was the sudden appearance of someone in the doorway which frightened her rather than the alarm ringing. She testified that she had never suffered a loss of voice before.

Following the incident, the worker testified that the foreman instructed a fellow worker to take her to a medical clinic near the factory. The worker gave evidence that a doctor at the clinic advised her to stay home and prescribed some medication. The company has no record of the worker's visit to the doctor. The worker testified that she did not want to lose time from work and she returned to work the same day.

On Wednesday, October 26 of the following week, the worker saw her family doctor, Dr. Masi. His note was included in the materials before the panel. He wrote "Has suffered from an acute loss of voice presumably as a result of the fright reaction". Dr. Masi also advised the worker to stay home; however, she returned to work.

The worker testified that the company nurse saw her at work on Monday, October 31. The worker was unable to speak above a whisper and the nurse told her to go home for the week. The worker apparently refused initially but said that the nurse obliged her to go home and see her family doctor. The worker did go home and was off work the rest of that week, returning on Monday, November 7, 1983.

Dr. Masi arranged for the worker to be examined by an otolaryngologist, Dr. L. Kane. Dr. Kane reported on November 1, 1983, that "This patient had a sudden attack of complete aphonia about ten days ago when she was exposed to a sudden alarm going off. The patient could not phonate in any way. The vocal chords could not be visualized, as the patient was unable to co-operate. I feel that (the worker's) aphonia is due to hysteria. I would suggest that she have a psychiatric examination".

Dr. Masi reported to WCB that his diagnosis was "conversion reaction".

The company did not file a Form "7" with WCB as required under Section 121 of the Act. According to Mr. Watt, this was because of the questionable nature of the claim. There is a letter dated November 17, 1983, from the company to WCB notifying the Board of the worker's claim and requesting that WCB "carefully review the above information and consider whether this was a work related disability".

The WCB investigator requested the opinion of Dr. Teskey, a Board Surgical Consultant, on the question of "entitlement for conversion reaction". In Memo #4, Dr. Teskey wrote: "No psychotraumatic episode. Dr. Kane's report could be enlightening. Agree to deny". Following the receipt of Dr. Kane's report, Dr. Teskey wrote in Memo #8: "basic personality trait obvious cause therefore agree to deny".

Workers' Compensation Appeals Tribunal

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The Appeals Adjudicator denied the worker's claim for entitlement. The Adjudicator found that because there was no traumatizing industrial occurrence, the Board's criteria outlined in its policy for psychotraumatic disability entitlement had not been met. The Adjudicator noted that there was no physical injury, no accident and no life threatening situation.

The employer's position at the hearing was that there was no accident or work related disablement. Mr. Watt contended that a basic personality trait rather than an accident was the cause of the worker's loss of voice. He maintained that the event the worker described was not uncommon; therefore, it was not a "chance event" and, thus, not an accident under Section 1(1)(a)(ii) of the Act.

The worker's representative provided the panel with written submissions which she referred to during the hearing. Her position was that the worker did suffer a personal injury by accident in that the worker's account of the incident together with the medical evidence supported a finding of aphonia caused by the workplace incident. She submitted that, in cases of aphonia, the physical injury and the psychotraumatic disability are both attributable to the single traumatic event.

The issue before the panel therefore, is whether the attack of aphonia experienced by the worker arose out of and in the course of her employment in accordance with Section 3(1) of the Workers' Compensation Act then in effect which states:

3(1) where in any employment, to which this Part applies, personal injury by accident arising out of and in the course of the employment is caused to a worker, his employer is liable to provide or to pay compensation in the manner and to the extent hereinafter mentioned, except where the injury,

a) does not disable the worker beyond the day of accident from earning full wages at the work at which he was employed;

THE PANEL'S REASONING:

In this case the panel did not come to an unanimous decision. The member of the Tribunal representative of employers dissents and his dissent is attached.

What follows is a decision of the majority of the panel. It should be borne in mind, therefore, that the reference to "panel" in these reasons refers to the majority.

During the hearing the worker was questioned by members of the panel as well as by Tribunal Counsel and by both representatives. Submissions were made by the worker's representative, the employer's representative and by Tribunal Counsel.

In this case, the worker claims that she suffered a psychotraumatic disability as a result of a frightening incident at work which caused her to lose her voice.

If it is established that:

1. the worker suffered a personal injury, and
2. the injury resulted from an accident as defined by Section 1(1)(a) of the Act, and
3. the accident arose out of and in the course of her employment,

the worker is entitled to compensation for her 1 week of lost time from work, if the lost time resulted from her disability.

The first question is whether the worker suffered a personal injury. There is no disagreement that the worker lost her voice, or suffered aphonia, immediately following the incident. The disagreement arises as to whether the aphonia was caused by the incident or whether it was due to a "basic personality trait".

Aphonia is described in Taber's Cyclopedic Medical Dictionary as an "Inability to produce speech sounds from larynx". Under etiology, it is noted: "Disease of vocal cords, paralysis of laryngeal nerves, pressure on recurrent laryngeal nerve; or it may be functional due to hysteria or psychiatric causes".

The worker's representative submitted copies from A.T. Murphy, writing in Functional Voice Disorders (New Jersey: Prentice-Hall, 1964) on hysterical aphonia, who wrote that

"Symptomatic alterations of structurally intact mechanisms constitute a conversion of psychological stresses into sensory or motor dysfunctions and are called conversion hysterias. Psychologically motivated aphonia falls into this category. ...Typically, the patient appears with the complaint of a sudden loss of voice precipitated by extreme fright or disappointment".

The last sentence appears to describe the worker's state. The worker's evidence is that she had no previous history of such problem and her testimony on that point was not disputed by the employer. The family doctor wrote that her loss of voice "presumably" was a result of the incident at work and characterized it as a "conversion reaction". Dr. Kane's opinion was that the aphonia was due to hysteria. Since the doctor was aware of the work incident, the majority of the panel interprets his statement to mean that the worker suffered an hysterical reaction to the incident at work which manifested itself as aphonia.

The WCB policy on adjudicating claims for psychotraumatic disability, Directive 22, states that "injury" may be a physical or an emotional disability. The Board's Procedures Manual in Document 33/21/01 states that diagnostic terms such as "conversion reaction" and "personality related emotional reactions" are early indicators of psychotraumatic disability. The medical findings in this worker's claim are consistent with the Board's indicators as outlined in its policy and in its Procedures Manual.

Workers' Compensation Appeals Tribunal

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The employer's representative pointed out at the hearing that the incident described by the worker was not uncommon and, therefore, no shock should result from it. He also noted that anyone using the door is an employee and not a stranger. Certainly, the worker's reaction to the incident she described was unusual and, very likely, most people would not react in this way. The majority of this panel finds, however, that it must look at the effect of the incident on this individual worker and not base its decision on how an "ordinary worker" would respond in a similar situation. An ordinary worker's response is something for the panel to consider in assessing this worker's credibility but it is our conclusion as to how this worker in fact reacted on which the decision must be based. The fact is that this worker was frightened by an incident at work and she suffered an immediate attack of aphonia. There is no history of similar problems and no evidence before the panel for it to find that the worker's reaction was due to a basic personality trait. Therefore, the majority of the panel concludes that the worker suffered an injury which resulted in the emotional disability manifested as aphonia.

With regard to the second question, which is whether the frightening incident constitutes an "accident" within the meaning of Section 1(1)(a) of the Act, the panel was asked by the worker's representative to consider the incident a "chance event" under Section 1(1)(a)(ii) of the Act. That section defines "accident" as including a "chance event occasioned by a physical or natural cause". The question before us is whether the sudden appearance of a person at the door and the ringing of the alarm constitutes a chance event. The panel notes that there is conflicting evidence on the issue of how often the locked security door was used. The worker's evidence at the hearing was that the door had never been opened. However, WCB Memo #3 indicates that the worker told the Board's investigator in November, 1983, that the alarm rarely went off. Memo #3 also included a statement by the investigator that she spoke with a co-worker who stated the alarm "does not go off frequently". Thus, the panel accepts the employer's evidence that the door was used occasionally. However, the situation described by both the employer and the worker was that the security door was locked at all times and was never used on any regular basis. Thus, even if the door was used from time to time, there was no way for the worker to predict when or how often it would be opened and the alarm set off.

In interpreting "chance event", the majority of the panel notes the ordinary dictionary meaning of "chance" as an occurrence that cannot be predicted or one that happens without forewarning. The majority of the panel also notes that the definition of "accident" in Section 1(1)(a)(ii) of the Act has recently been interpreted to be a paraphrase of the words "any unintended and unexpected occurrence which produces hurt or loss".¹ Taking into account these definitions, the majority of the panel concludes that the door opening on the occasion in question constitutes a chance event and, therefore, an accident defined as a chance event did occur.

¹ Re: Kuntz and Workers' Compensation Board,
Re: Dagenais and Workers' Compensation Board (1985) 51 O.R. (2nd) 729.

The final question is whether the incident arose out of and in the course of the worker's employment. The majority of the panel accepts the worker's evidence that she was startled and frightened on October 21, 1983, when a person appeared in the doorway and set off the alarm. The frightening event arose from the environment of the workplace while the worker was doing her regular assigned work during normal working hours. Thus, the majority of the panel finds that the incident arose out of and in the course of the worker's employment.

Having accepted that the worker's claim falls within Section 3(1) of the Act, the question then arises in this case whether the worker is disentitled to compensation on the basis of Section 3(1)(a) of the Act then in effect; that is, that she was not disabled beyond the day of the accident from earning full wages. The worker's evidence was that she returned to work the day of the incident and remained working for approximately one week, with no lost time or income.

The worker testified that, although two doctors advised her to lay off work, she continued working until the company nurse insisted that she leave work on October 31. The company was unable to produce a report from the nurse nor was she called as a witness. The WCB did not take a statement from the nurse on this point. The panel is left to draw an inference from the fact (which is not disputed) that the nurse sent the worker home. The majority of the panel concludes that the fact the nurse sent the worker home is an indication that the worker's disability was such that she was unable to continue her work. The nurse's assessment of disability meant that the worker was unable to earn full wages at the work at which she was employed. Thus, the majority of the panel accepts that the worker was disabled beyond the date of the accident from earning full wages.

Decision:

The appeal is allowed. The worker is entitled to compensation for her 1 week of lost time from work resulting from an attack of aphonia which arose out of and in the course of her employment. The Tribunal leaves to the WCB the calculation of the amount in question, without prejudice to the worker's right to further appeal should there be any dispute concerning that calculation.

Dated at Toronto this 13th day of February, 1986.

Signed: L. Bradbury, L. Heard.

Workers' Compensation Appeals Tribunal

DISSENT

REFERENCE: DECISION NO. 14

I have had the opportunity to review and discuss thoroughly the majority decision. The outline of the incident in question is basically straight forward. I am, however, respectfully unable to accept in totality the opinions and conclusions of my colleagues.

The incident centres around the "door" located in the work area in which the employee had worked from one to three months. After much questioning of the worker and employer, it was generally agreed that:

1. the door located at one end of the stockroom separated the work area from the stockroom;
2. the door was not the usual door for removing stock to the work area;
3. the door was locked with a key in the control of a foreman;
4. the door was opened only upon direction of a foreman for the removal of stock by other employees;
5. the door was magnetically alarmed so that a 5-6" alarm bell sounded when the door opened;
6. the door was opened approximately two or three times a week, such that in the period of employment, the door would have been opened as few as eight times and as many as twenty-six times.

On these facts:

I am unconvinced and therefore unable to accept that the opening of the door with the resultant bell ringing and employee entry could be the cause of this worker's most unhappy experience.

I would therefore dismiss the appeal.

Having reached this conclusion, there is no need to comment further upon other conclusions reached by my colleagues.

D.C. Mason
Member

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Workers' Compensation Appeals Tribunal

DECISION NO. 15

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: D. Mason

Member: L. Heard



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 15

THE APPEAL PROCEDURE:

The worker appeals the February 20, 1984, decision of the WCB Appeals Adjudicator, Mr. G.R. Linklater.

This matter came on for hearing on January 9, 1986, before a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, D. Mason, a Tribunal member representative of employers, and L. Heard, a Tribunal member representative of workers.

Mr. J. Kerr appeared on behalf of Mr. J. Hoyles, counsel for the worker and requested an adjournment. The employer was not represented and is not a party to the appeal, having discontinued business some years earlier. Mr. D. Starkman appeared on behalf of the Tribunal's Counsel Office.

THE ISSUE AND HOW IT ARISES:

The worker's representative requested an adjournment in writing prior to the hearing. The representative outlined the following grounds on which he based his request:

1. He was required in District Court on a criminal matter on the date scheduled for this hearing but was not advised of this until after he had agreed to the date for the appeal before this Tribunal. He advised the Counsel Office of the conflict at the earliest opportunity.
2. An adjournment would not result in prejudice to anyone since the employer is not appearing on the appeal and the worker is consenting to the adjournment.
3. Both the representative and the worker are from northern Ontario. They had only one month's notice of the hearing. That short notice, combined with their lack of notice regarding the Tribunal's adjournment policy, adversely affected them.
4. In addition, denial of an adjournment would prejudice the worker who would be forced to appear and be represented by an agent unfamiliar with his case.

On behalf of the Tribunal's Counsel Office, Mr. Starkman supported the request for an adjournment. He noted that there has been no public notice to the community with regard to the Tribunal's policy of not granting adjournments. In this case, therefore, the worker's representative may not have had adequate notice of such policy.

THE PANEL'S REASONING:

In determining the issue of an adjournment, the Panel notes that Section 86k of the Workers' Compensation Act, R.S.O., 1980, as amended, is the relevant section of the legislation. That section states, in part,

"The Appeals Tribunal shall determine its own practice and procedure...".

In order to determine the extent of the Tribunal's power to decide whether an adjournment should be granted, the Panel reviewed the practice of other tri-partite Tribunals, as well as the relevant case law on the question of adjournments.

The Ontario Labour Relations Board is a tri-partite Tribunal similar to the Appeals Tribunal.¹ Regulation 546, Section 82(1) which applies to the O.L.R.B., states:

"The Board may, if it considers it advisable in the interests of justice, adjourn any hearing...".

The practice of the O.L.R.B. has been generally to refuse to grant an adjournment unless all parties consent or there are exceptional, extenuating circumstances.

The extent of the O.L.R.B.'s discretion in deciding the issue of adjournments has been reviewed in a number of cases.

In R vs Nick Masney Hotels Limited, 13 D.L.R. (3rd) 289 (Ontario Court of Appeal), Mr. Justice Laskin heard an appeal by the O.L.R.B. from a judgment of Addy, J. in the Supreme Court of Ontario. The case arose when the O.L.R.B. followed its ordinary procedure, as set out in its rules, of refusing to grant an adjournment except on consent of all parties and then dismissed an application to reconsider its decision. Laskin, J.A. stated, in obiter,

"When, as here, adequate notice has been given of a hearing date and an opportunity afforded to make representations, the failure of a party to secure an agreement for an adjournment, where it has not been misled by another party to that other's advantage and where the Board has stood above the negotiations and has properly followed its own rules, fashioned for the protection of all parties, there is no denial of natural justice to support a successful certiorari against the Board."

¹ Unlike the Appeals Tribunal, the O.L.R.B. is bound by the Statutory Powers and Procedures Act which provides, in Section 6, that reasonable notice of a hearing must be given by a Tribunal and sets out the notice requirements.

The Ontario Divisional Court, in the case of Re Flamboro Downs Holdings Limited and Teamsters Local 879 (1979), 24 O.R. (2nd) 400, dealt with the extent of the O.L.R.B.'s discretion to determine whether an adjournment should be granted. The appellant argued that the Board's policy not to grant adjournments, except with the consent of all parties, constituted a fettering of the Board's discretion and the mechanical application of the policy in all cases amounted to a denial of natural justice.

Robins, J., in dismissing the application, wrote:

"Clearly, an Administrative Tribunal such as the Labour Relations Board is entitled to determine its own practices and procedures. Whether in a given case an adjournment should or should not be granted is a matter to be determined by the Board charged as it is with the responsibility of administering a comprehensive statute regarding labour relations. In the administration of that statute the Board is required to make many determinations of both fact and law and to exercise its discretion in a variety of situations. In the case of the request for adjournment, it is manifestly in the best position to decide whether, having regard to the nature of the substantive application before it the adjournment should be granted or whether the interests of the employer, the employees or the union who, as the case may be, oppose the adjournment should prevail over the party seeking it. As a matter of jurisdiction, it is for the Board to decide whether it should adjourn proceedings before it and in what circumstances.

This is not to say that there cannot be situations in which a refusal to grant an adjournment might amount to a denial of natural justice. There are circumstances in which that might be so.... It is necessary to examine the facts of each case to determine if the Tribunal acted, as it must, in a fair and reasonable way. It must, of course, comply with the provisions of the Statutory Powers and Procedures Act, 1971, and afford the parties the opportunity to be present and be represented, if they wish, by counsel. But a party who has adequate notice of the hearing does not have a right to an adjournment and is not entitled to insist on one for his convenience or the convenience of his representative. It is for the Board to determine whether to adjourn on the basis of the obvious desirability of speedy and expeditious proceedings in Labour Relations matters, the background of the particular case, the issues involved, the reason for the request and other like factors."

In the Nick Masney case, Laskin, J.A., also looked at the question of when a denial of an adjournment might amount to a denial of natural justice. He noted that if the Board did not arbitrarily apply its policy, but heard and considered submissions for adjournments and based its decision on the prevailing facts and circumstances, then the Board could not be said to have denied natural justice.

The following principles emerge from a review of the cases:

1. A Tribunal such as the Appeals Tribunal has the right to adopt a general policy respecting adjournments of its proceedings.
2. A Tribunal cannot apply such a policy arbitrarily but must consider the circumstances of each case.
3. Parties who have had adequate notice of the hearing do not have a right to an adjournment and are not entitled to request one for their convenience; rather, the Tribunal has to balance any request against the desirability of speedy and expeditious proceedings.

Any guidelines established by this Tribunal must reflect the fact that the Tribunal is currently receiving, on average, 62 applications per week for appeals. This represents approximately 3200 applications per year. Thus, our guidelines must recognize the need for timeliness and efficiency in setting dates, holding hearings, and granting decisions.

If the Tribunal were to grant adjournments, even on consent of both parties, our process would quickly become unmanageable. However, two other factors must be considered:

1. The fact that the Tribunal is still in its early stages, so that some flexibility is required in its process; and
2. The requirements of natural justice.

DECISION:

The request for an adjournment in this case is granted.

Keeping in mind the requirements outlined above, the following guidelines are established for the Tribunal in considering future requests for adjournment:

1. Generally, the Tribunal will not grant adjournments where parties have had adequate notice of the hearing date. The Tribunal considers six weeks' notice to be adequate.
2. The hearing date will be set by the Tribunal and will not necessarily be set on consent.
3. Adjournment requests are to be made in writing, prior to the hearing date, with copies of the written reasons for requesting the adjournment provided to the client and to the other party.
4. The request and any response by other parties will be considered by a Panel of the Tribunal.
5. The test applied by the Panel will be one of granting adjournments only in exceptional circumstances. Generally, the representative's convenience and timetable conflicts will not be considered an exceptional circumstance.

6. At this early stage in the Tribunal's operation, there may be some cases in which less than six weeks' notice of hearing is given. Where the Tribunal gives parties less than six weeks' notice, alternative hearing dates will usually be arranged where either of the parties finds it impossible to attend on the scheduled date.

DATED at Toronto this 22nd day of April, 1986.

SIGNED: L. Bradbury, D. Mason, L. Heard

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Workers' Compensation Appeals Tribunal

DECISION NO. 16

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: N. McCombie

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #16

THE APPEAL PROCEDURE:

The worker appeals the June 10, 1985 decision of the Workers' Compensation Board Appeals Adjudicator, J.M. Davies.

The appeal was heard on January 13, 1986 by a panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, N. McCombie, a member of the Tribunal representative of workers, and D. Mason, a member of the Tribunal representative of employers.

The worker appeared without representation. The employer appeared and was represented by Mr. C. Sheehan, Claims Agent for the employer. Mr. R. Sutherland attended from the employer company as an observer. The Tribunal was assisted by Mr. D. Munro, a member of the Tribunal Counsel Office, who appeared in the role of Tribunal counsel.

The panel heard and considered oral evidence given under oath by the worker and read the relevant forms, memoranda and reports extracted from the WCB file and collected in the Case Description Materials. It also read the Case Description recital of facts prepared by the Tribunal's Counsel office and agreed to by the worker and the employer. Submissions were made by the worker, by the employer representative and by Tribunal counsel.

THE ISSUE AND HOW IT ARISES:

The worker injured his back in a work related accident on July 23, 1979. On December 12, 1980 he was awarded a 20% permanent pension in the amount of \$165.25 per month.

In March, 1985, the worker contacted WCB's Vocational Rehabilitation Division to request full commutation of his pension in order to clear his debts and purchase a mobile home in Marystow, Newfoundland, where he currently resides. The commutation request was the fourth attempt by the worker since 1980 to receive a lump sum payment of his pension. The capitalized value of his pension is approximately \$27,000.

The worker's most recent commutation request was denied by the Vocational Rehabilitation Division and an appeal by the worker to an Appeals Adjudicator was dismissed on the grounds that his request did not meet WCB's policy requirements because the particular commutation request could not be considered to be a rehabilitative measure.

At the Appeals Tribunal hearing the worker told the panel that he was presently unemployed and was living in a rented mobile home in Marystow with his spouse and two children. His spouse is also unemployed.

Their total income at present is \$755 per month, of which \$173 per month arises from the worker's WCB pension, and the balance of the income is from social assistance.

The worker indicated that his current expenses amount to \$770 per month, exclusive of any debt payments. He estimates his current debt load at approximately \$7,300, and except for the identification of a social services overpayment of approximately \$1,700, the worker's debt load has remained relatively constant for some period of time. The worker would require an additional income of approximately \$300 per month to meet the monthly payments on his current debt load. He advised the panel that no legal action is pending on any of his debts.

The worker advised the panel that if a commutation was granted, he would pay off all of his debts and would use the balance of approximately \$20,000 to purchase and furnish a mobile home in Marystow, Newfoundland. Information previously submitted by the worker indicates that the purchase of a mobile home would require approximately \$18,000, including \$1,000 for furnishings.

The worker told the panel that he had access to a number of job opportunities both in Newfoundland and Toronto. For example, he believed he could obtain a job as a bartender in his uncle's establishment in Newfoundland. He thought the bartender job would pay approximately \$200 per week in take-home pay. He stated that he thought that financially he would be no better off working than he presently is on social assistance.

THE PANEL'S REASONING:

During the hearing the worker was questioned by members of the panel as well as by Tribunal counsel and by Mr. Sheehan on behalf of the employer. The panel accepts the oral evidence of the worker.

Because one of the hearing panel members is unable to concur in the panel's decision, what follows is the reasoning of the majority of the panel.

The worker seeks to commute his permanent disability pension into a lump sum payment. A permanent disability pension is intended to reflect the impairment of earning capacity of the worker. It attempts, as much as possible, to compensate the worker for future earnings which are lost because of the disability. The Act requires that compensation for a permanent disability "shall be a weekly or other periodic payment during the lifetime of the worker".¹ Thus, once it is determined by the Workers' Compensation Board that a worker has a permanent disability resulting from a work-related incident, the worker basically has a right to periodic compensation in an amount determined by the Board to reflect impairment of earning capacity.

There are several exceptions to the rule that pensions shall be paid on a periodic basis. One exception is found in Section 43(4) of the Act which establishes a presumption in favour of a lump sum payment in situations where the impairment of the worker's earning capacity does not exceed 10% of the worker's earning capacity. The other exception, found in Section 26 of the Act, provides the Board with a discretion to commute periodical payments into a lump sum award. This is the section upon which the worker in this case relies in seeking a commutation.

¹Section 43(1) of the old Act.

Section 26 of the Act contains no criteria to be used in exercising the discretion to commute a periodic pension. The section simply states "that the Board may commute the weekly or other periodical payments payable to a worker or dependent for a lump sum". Section 43(4) on the other hand is not discretionary. It is mandatory. Where the pension does not exceed 10%, "the Board shall, unless the Board decides that it would not be to the advantage of the worker to do so, direct that such lump sum may be considered to be the equivalent of the periodic payments shall be paid to the worker". The wording of Section 43(4) suggests that the onus rests with the Board to establish that a commutation of a pension which does not exceed 10% would not be to the advantage of the worker. In other words, there is a statutory presumption in favour of granting a commutation. A comparison of the two sections suggests that a different onus arises under Section 26 than under Section 43(4). In the case of a general commutation under Section 26, the wording of the statute suggests that it is not up to the Board to justify why a commutation should not be granted. Applications for pension commutations under Section 26 are normally brought by the worker. This is due to the fact that the Board has already granted a periodic pension payment under Section 43 and it is the worker who seeks to alter the method of payment of compensation. Normally, an applicant has the responsibility of establishing why an application should be allowed. We see no reason to depart from the norm in the case of a pension commutation and indeed, a comparison of the wording between Section 26 and Section 43(4) supports our conclusion that the worker has the onus of establishing that a commutation should be granted.

Under what circumstances, then, should a commutation request be granted? What criteria should be used or objectives sought in considering a commutation request? In what circumstances is it appropriate to eradicate periodic payments which represent loss of future earnings and substitute in their place a single lump sum payment?

An important objective of permanent disability pensions is to provide the worker with replacement income. To the extent that a worker under a permanent disability is unable to produce income at his or her pre-accident earning level, there will inevitably be some difficulty returning to work after an accident at a job paying less money. In this way, a permanent periodic pension can be seen to be rehabilitative in nature in that it seeks to provide the permanently disabled worker with sufficient additional funds to offset what is presumed to be a loss in wages as a result of the permanent disability. If the periodic payments cease because of a lump sum commutation, then there exists the real danger that the rehabilitative purpose of a periodic pension will be thwarted.

It is appropriate, then, in our view, in considering a commutation request, to consider whether the commutation of a periodic pension will result in a positive trade-off--that is, will it be in the long-term interests of the worker? It is not sufficient to consider whether a commutation request produces a more satisfactory short-term result. Inevitably, a lump sum commutation produces in the short-term a positive economic advantage to the worker. In other words, if the short-term interests of the worker were an important criteria in deciding whether to grant a commutation request, a strong case for commutation could be made in respect of most pensions. If most pensions were commuted, the periodic payment system contemplated by the Act would be defeated. Had the legislature intended such a result, it could easily have made the lump sum commutation expressly available at the worker's discretion in every case. It has chosen not to do so. It must follow that the legislature intended the Board to adopt commutation criteria that reflected something other than the worker's short-term interests and personal wishes.

This panel is satisfied that it is appropriate to establish long-term rehabilitative potential as the criteria to be applied in considering pension commutation requests, and to require the worker to satisfy the Board that a commutation request is in fact meets that criteria. In our view, it must be clearly established by the worker that the commutation will enhance his or her income position over the long term.

The Workers' Compensation Board has developed a set of policies and criteria to be considered when a commutation request is made. To justify an erosion or termination of monthly payments which the worker would otherwise receive over his or her lifetime, the criteria require the worker to demonstrate that the granting of a lump sum payment will be rehabilitative in the long term and will be in the injured worker's long term best interests. We are of the view that the objectives and criteria established by the Board to assist in the exercise of the Board's discretion are reasonable objectives and criteria and are in line with the rationale which we have discussed earlier in this decision.

Of relevance to this appeal, the Workers' Compensation Board has established criteria for the granting of a commutation in order to purchase a home or to clear debts. The criteria are:

Purchase of a Home:

1. When a disability such as paraplegia necessitates special accommodation;
2. When a change of employment or unforeseen circumstances requires relocation and rental accommodation is not considered suitable.

The purchase should be clearly rehabilitative in nature or essential to maintain previously established rehabilitation measures.

Reduction or Clearance of Debts:

1. When the worker may become unemployed as the result of a precarious financial situation;
2. When the worker can no longer cope with his obligations for reasons other than poor management.

Clearance of debts should be clearly seen as a solution to the problems involved and should restore solvency and continuing rehabilitation. It should be clearly established with the worker that debts may be paid off on a "once only" basis.

This panel concludes that the worker's request does not meet any of the above considerations. With respect to the purchase of a home, special accommodation is not required nor is the issue one involving relocation for purposes of employment. Indeed, the purchase of a home in Newfoundland might unnecessarily restrict the worker's job opportunities in Ontario.

With respect to debt clearance, the worker will not become unemployed because of his financial situation. Although the debt load is sizeable, it has remained relatively constant for several years and no legal action is pending at the present time. There is no evidence that the worker has reached the point where he just cannot cope with the debt load.

The Board's criteria are not necessarily exhaustive. However, if the commutation request does not meet the criteria established by the Board, the worker must satisfy the Board that the request will be in the worker's long term best interests from a rehabilitative perspective. In this regard, the worker advised the panel that if his commutation request was granted, it would be worth his while to return to work and he would be able to move off social assistance. At first glance, this suggestion seems meritorious since it is commonly recognized that one of the purposes of a periodic pension scheme is to prevent worker's from becoming a drain on the tax payer. In this case, there is a suggestion that the award of the pension commutation will enable the worker to end his reliance on social assistance.

However, on a careful examination of the matter, the panel concludes that the worker already has an incentive to return to work. In response to questioning by the panel, the worker admitted that working for his uncle would produce several hundred dollars per month more than his current situation on social assistance. In our view, the worker has not returned to work because he has been under the mistaken impression that he would be no better off at work than on social assistance. There already is financial motivation for the worker to go off social assistance. Moreover, if a commutation were granted for the purposes requested by the worker, the possibility exists that the acquisition of a mobile home might have adverse consequences on his ability to collect social assistance. He has not clearly demonstrated that he has access to a stable source of income apart from social services. In our view, there exists the real possibility that the granting of this commutation request far from being rehabilitative in nature, could seriously jeopardize the worker's short and long term financial situation and upset what is presently a relatively stable financial situation.

We also note that there is some question as to the extent that this panel ought to substitute its opinion for that of the Board's in a commutation request. The decision of the Board is a discretionary one. In this case we concur with the Board that the commutation request is not rehabilitative in nature and is not in the worker's long term interests and we find these objectives to be in accordance with the intention of the Workers' Compensation Act. Had we come to a different view, it would perhaps have been necessary for us to consider whether there is a different standard of review of Board decisions involving an exercise of discretion as opposed to the decisions of the Board which are mandated by the Act.

DECISION:

We are of the view that the worker's request for pension commutation is not in accordance with the objectives of the Act and does not meet rational criteria for the award of a commutation. Accordingly, the appeal is denied.

DATED at Toronto this 4th day of March, 1986

SIGNED: J. Thomas, D. Mason.

MINORITY DECISION

INTRODUCTION:

The representations outlined under the heading "The Appeal Procedure" and the reasoning of the panel's majority decision were carefully considered by myself. I find, however, that I must respectfully dissent with my colleagues in their decision. It must first be emphasized that in the case before us, as opposed to most other cases which the Tribunal must consider, there is no contention over facts. A ruling by the Tribunal on a commutation request will not, in theory, result in more or less money going to a worker. It will not result in the accident employer - or any of the Board's accident funds - paying more or less in the claim in question. Rather it is simply a question of how the award is to be paid. That being the case, it is my view that a lesser standard of proof be required in adjudicating commutation cases. In most cases, the Tribunal is usually asked to make a decision which will result in either a worker being denied an amount of money he/she is seeking or that money being awarded and charged to the WCB's accident fund or the individual employer. In arriving at that decision, the Tribunal usually has to weigh medical, factual, policy and legal considerations.

The Tribunal is not being asked here, however, to determine factual or medical questions, but rather is being asked to make a decision on the personal judgment of the worker. Any decision of this nature must be done with extreme sensitivity.

HISTORY:

While a WCB pension was intended to be a replacement for potential lost income, its status as a periodic payment was decided only because it was assumed, in 1913, that a periodic payment would be more likely to prevent workers from becoming dependent upon "charity". Mr. Justice Meredith, the founder of the Ontario Workers' Compensation system, wrote, in that year:

The payment of lump sums is contrary to the principle upon which compensation acts are based and is calculated to defeat one of the main purposes of such laws - the prevention of the injured workman becoming a burden on his relatives or friends or on the community - and has been generally deprecated by judges in working out the provisions of the British act, and was condemned by the (Canadian Manufacturers') Association itself in the memorandum which it submitted, and which appears in the appendix to my first interim report. (Meredith, Final Report, page 11, emphasis added.)

In this case, we face the irony of a worker who is currently a "burden on the community", while in receipt of a monthly pension. His evidence was that he would cease to be a "burden" if his pension was commuted. If we accept that the principle, as outlined by Meredith, is to reduce a charge upon public funds, then we must therefore accept the advisability of commuting this worker's pension.

BURDEN OF PROOF:

From a public policy point of view, it is my belief that the Tribunal must only look at whether or not there is a compelling reason to deny a commutation request. The pension awarded to a worker is, in practice, a lump sum amount charged against the cost record of the accident employer. This lump sum is then held in trust by the WCB, on behalf of the worker, and paid out as a monthly award. In essence, then, the capitalized sum is the worker's award, and he or she should be entitled, upon reasonable request, to receive the lump sum amount to administer on his or her own behalf.

This is not to say that all requests for pension commutations should be automatically granted. As the majority decision makes clear, the intention of the legislature was that pensions be paid as a periodic payment, so the monthly pension cheque is the "norm". As the majority decision states, however, the legislature also provided, pursuant to S.26 (and also S.43(4)) that these awards may be paid as lump sums. The majority notes that the wording of these two sections dealing with commutations differs, therefore indicating a different standard should apply in determining entitlement to a lump sum. And, I would agree with my colleagues that S.26, as a discretionary section, requires the development of reasonable tests which applicants should be expected to meet.

In my view, however, the tests that must be met by applicants for a commutation under S.26 should be limited to:

1. Whether the disability has stabilized;
2. Whether the applicant understands all the financial ramifications of his/her request;
3. Whether the applicant has provided a reasonable explanation for why he/she wants the pension commuted;
4. Whether that explanation appears, at face value, to be "rehabilitative", in a broad sense.

These basic tests should then be weighed against any evidence which would indicate a failure to meet them. If, for example, an applicant wanted to commute a pension with a view to spending the proceeds on lottery tickets, the applicant would fail the above tests and the commutation should be denied. Or, if there was evidence that the applicant was mentally incompetent, the application should also be denied.

The majority decision suggests that "...it is appropriate to establish rehabilitative criteria in considering pension commutation requests...", and I have no difficulty in accepting that position. However, once that premise is accepted, it is incumbent upon the Tribunal to determine from the evidence before it whether a particular request for a commutation is in keeping with "rehabilitative criteria". Given the lack of statutory direction in S.26, the onus in such cases, I would contend, should lie with the employer or the WCB to show that the request does not meet these objectives, as characterized above, rather than with the worker to show the contrary.

In the present case however, the worker put forward a request - outlined in the majority decision - which appears reasonable. He was aware of the financial implications and his proposal entailed a rehabilitative measure in the sense that he would "start a new life", by owning his own home, paying off his debts and feeling he was farther ahead by working.

"BEST INTERESTS":

The majority decision states that, "...it is appropriate for the Board to consider the long-term interests of the worker..." It was also the submission of the employer's representative during the Hearing that he was opposed to the commutation, not on any grounds of financial inconvenience to the employer, but because he felt it would not be in the "best interest" of a former employee. The implicit reasoning of the Board and of the Tribunal majority decision is also that a commutation would not be in the worker's "best interest".

This raises the fundamental question of who can best judge what is in another person's "best interest". I am unable to over-rule, without compelling evidence, what the worker himself judges to be his best interest. The panel heard from the worker what he proposed to do and I cannot predict whether this proposed course would result in success or failure. To make such a prediction, and base a decision upon it, carries with it a paternalism which may have been envisioned by the Legislature in 1913 when this section was first drafted, but which I believe is unacceptable today.

In my view, in cases where there is a prima facie reason for commuting the monthly pension, there must be far stronger evidence that it would not be in the worker's best interest than in the current case. Where all else is equal, the person who is in the best position to determine what is in the best interest of the worker, is the worker him/herself.

In the case before the panel, it is my view that the worker met the tests outlined above, and that there was no evidence introduced which would lead us to the conclusion that a commutation would not be in the worker's best interest. I would therefore have allowed the appeal and granted the commutation request.

SIGNED: Nick McCombie

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Workers' Compensation Appeals Tribunal

DECISION NO. 17

Tribunal d'appel des accidents du travail

Panel Chairman: A. Signoroni

Member: N. McCombie

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

February 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NUMBER 17

THE APPEAL PROCEDURE:

The worker appeals the June 19, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, W. Ireland.

The appeal was heard on January 15, 1986, by a Panel of the Appeals Tribunal consisting of A. Signoroni, Panel Chairman, N. McCombie, a member of the Tribunal representative of workers, and D. Mason, a member of the Tribunal representative of employers.

The worker appeared and was represented by A. Pope, M.P.P. The employer was represented by K.A. Guillemette. The Tribunal was assisted by P. Auron, a member of the Tribunal's Counsel Office, who appeared in the role of Tribunal counsel.

The Panel heard and considered evidence given under oath by the worker and by the employer's representative in oral testimony.

The Panel also read the Case Description recital of facts prepared by the Tribunal's counsel and agreed to by the worker's representative and by the employer's representative. The Panel further read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description materials. The Case Description was filed as Exhibit "1" at the hearing.

The Panel received and considered additional documents introduced at the hearing by the worker's representative, namely:

- a) a medical report from Dr. Bateman, dated November 25, 1985, marked as Exhibit "2";
- b) two photographs of the worker's home, marked as Exhibit "4";
- c) a medical report from Dr. Dakin, dated October 23, 1985, marked as Exhibit "6".

In addition, the panel received and considered the following documents introduced at the hearing by the employer's representative:

- a) a letter from the employer to the Appeals Tribunal, marked as Exhibit "3";
- b) seven "return to work" reports, of various dates, marked as Exhibit "5".

Submissions were made by the worker's representative, the employer's representative and Tribunal Counsel.

THE ISSUE AND HOW IT ARISES:

The worker is a 31 year old man who has worked for his present employer for over 11 years. Prior to his accident in 1984, the worker had been working as a forklift operator.

On April 10, 1984, the worker and a co-worker were manually lifting and sliding some heavy anodes which had fallen from a conveyor. Each anode weighed approximately 320 pounds. The worker's Report of Accident indicates that the worker was slightly bent over forward with a two foot hook putting anodes into place when he felt a pinch in his lower mid-back. The worker carried on working. The worker indicated that his back was quite painful during the days following his accident. The two days immediately following his accident were his regular days off. He visited a doctor of chiropractic the day following his accident and when he returned to work after his days off, he reported his accident to his employer. He was given light work in the office for approximately one month after he returned to work. However, according to both his evidence and the attendance records introduced at the hearing, the worker did not work full days for several weeks after the accident. The worker indicated that he would go home when the pain was unbearable.

Although there was some evidence to suggest that the worker had experienced back problems prior to April 10, 1984, the Panel notes that much of this related to the upper back. Also, it appears from the reports submitted, including the April, 1984, report of a doctor of chiropractic, Dr. R.E. Jarvensivu, that the worker's back was asymptomatic before the accident in April, 1984.

Although no immediate lay off resulted from the April 10, 1984 accident, medical costs were paid since the compensability of this accident was not questioned by either the WCB or the employer. The worker returned to his regular job as a forklift operator in May, 1984. From the date of his accident until August, 1984, he continued to make frequent visits to Dr. R.E. Jarvensivu. He also visited Dr. P.D. Moran in June, 1984, since his back pain was not improving.

The worker was also referred to Dr. E.B. Dakin, an orthopaedic surgeon. Dr. Dakin examined the worker on September 12, 1984.

On September 27, 1984, the worker was moving wood from a pile next to his house into the basement through a basement window. A photograph showing the relative position of the woodpile to the house and the height of the window was introduced and filed as Exhibit "4". Another photograph, also marked Exhibit "4" showed a different pile of unsplit wood.

The worker indicated that the wood he was moving was wood from a previous year which was split and dried so each log weighed approximately five to eight pounds. He indicated that he only put in one to two pieces of wood at a time due to the small window through which he was putting the wood.

After about one hour of moving wood, the worker experienced pain in the low back and was forced to stop moving the wood.

The next day, the worker telephoned the employer and advised that his back was too sore for him to return to work. The worker did not return to work until February 22, 1985.

The worker claimed entitlement to full compensation and medical benefits for the period from September 28, 1984 to February 22, 1985.¹

The Appeals Adjudicator found that the low back disability suffered by the worker during the period from September 28, 1984 to February 22, 1985 was caused by the moving of wood on September 27, 1984. The Appeals Adjudicator found that it was therefore not compensable because it was not caused by the compensable accident of April 10.

This Panel is therefore required to decide whether or not the worker's disability during the relevant period resulted from the compensable injury of April 10, 1984.

THE PANEL'S REASONING:

At the hearing, the worker was questioned extensively by the members of the Panel, the Tribunal's Counsel, the employer's representative and by his own representative. The Panel found the worker to be a credible witness. In this regard it should further be noted that the employer's representative made several positive references to the integrity of the worker during the hearing. Likewise, the employer's representative, in her role as a witness, was also found to be credible.

The employer took the position that the wood-moving of September 27, 1984, was unrelated to the compensable accident of April 10, 1984. The worker's disability did not, according to the employer, result from the injury caused by that accident. The employer argued that the worker had recovered from the April 10 injury and was experiencing no residual disability by September 27, 1984. The wood-moving incident was, according to the employer, a new accident which caused the disability suffered by the worker during the period relevant to this appeal. Since the wood-moving was non-work related, any injury caused by the wood-moving would be non-compensable.

The worker, on the other hand, argued that the disability which he suffered from September 28, 1984 to February 22, 1985 resulted from the injury caused by the April 10 compensable accident and that it was therefore compensable.

In deciding whether the disability resulted from the injury which occurred on April 10, 1984, this Panel has considered the nature of the injury caused by the April 10 accident, the extent to which the worker had recovered prior to September 27, the nature of the wood-moving incident, and the nature of the injury and disability subsequent to the wood-moving incident.

¹By "full compensation" is meant the temporary total disability compensation defined by Section 39. Unless otherwise stated, all section references in this decision refer to section numbers as they existed prior to April 1, 1985.

The Injury Caused by the April 10 Accident:

There were a number of medical reports dealing with the April 10 injury.

A doctor of chiropractic, Dr. Jarvensivu examined the worker the day after the accident. He reported:

"Acute pain arose base of back aggravated by bending and lifting,
- lateral gluteal and lumbar muscle spasm. Sacroiliac and
lumbar subluxations present."

His initial diagnosis was acute lumbo sacral sprain strain.

According to the worker, he continued to experience low back pain after the April 10 accident. Dr. Jarvensivu's reports confirm this for the period from and including April to August, 1984. Dr. Moran's report confirms that the worker was continuing to experience pain when he was examined by Dr. Moran in June, 1984.

In early September, the worker had X-rays taken at the Porcupine General Hospital. Radiologist Dr. J.G. Flatman examined the X-rays and detected no significant abnormality in the lumbar spine region. The Panel recognizes, however, that X-rays are often of limited use in detecting disc injury.

On September 12, 1984, the worker was examined by an orthopaedic surgeon, Dr. E.B. Dakin. In his report, Dr. Dakin referred to the April back injury and concluded:

"This man has had a disc injury which might continue to give him problems..."

A subsequent report by Dr. Giorgetti at the Porcupine General Hospital indicated that Dr. Dakin confirmed that the worker had a lumbosacral disc herniation.

Extent of Recovery Prior to September 27:

There was some evidence to indicate that the worker had recovered from the April 10 injury prior to September 27, 1984.

The worker had originally described the April 10 accident as "minor". He had been able to resume his pre-accident work in May, 1984 and approximately one month after the accident, he consented to work overtime and continued to do so whenever he was asked. In addition, Dr. Dakin had not suggested that the worker should change jobs even though Dr. Dakin noted that operating a forklift aggravated him with the jolting and jarring. Also, after May, 1984, the worker did not visit the Company's First Aid facilities with any complaints of back problems and he was not prescribed any medication.

However, the preponderance of evidence indicates that the worker had not recovered from the April 10 injury prior to September 27, 1984.

Dr. Jarvensivu submitted reports to the WCB in April, May, June, July and August, 1984. Until August 7, 1984, the worker was visiting Dr. Jarvensivu for chiropractic treatments approximately three times per week. Dr. Jarvensivu's reports indicate that the worker continued to experience moderate pain across the base of the low back during this period. In his report dated August 7, 1984, Dr. Jarvensivu noted that the worker was continuing to experience moderate pain and that he had referred the worker to an orthopaedic surgeon, Dr. Dakin.

When Dr. Dakin examined the worker on September 12, he noted some loss of spinal rhythm and slight tenderness in the lumbar musculature. He recorded that the worker, on the date of the accident, felt a burning in his back and this continued to get worse. He noted that the chiropractic treatments had given moderate relief. Dr. Dakin also noted that the worker was "operating a forklift which does aggravate him with the jolting and jarring but generally he can tolerate the sustained posture and is doing his best to continue with the work force." He concluded that:

"This man has had a disc injury which might continue to give him problems, it might get worse and cause him to go out of the work force but at the present time it remains hopeful that he can continue to do his work provided he avoids heavy lifting with rotation and too much sustained posture and jolting and jarring."

On the basis of the evidence of the worker, as well as the evidence of the professionals who actually examined the worker prior to September 27, we conclude that the worker had not fully recovered from the back injury caused by the April 10 accident.

The Nature of the Wood-Moving Incident:

The worker heats his home with wood. He indicated that, in years prior to the April 10 accident, he had cut, split, thrown in and piled 18 to 20 face cords per year without any problem. On September 27, the worker was taking wood which was left from a previous year from a pile next to his house and moving it approximately 3 feet to a basement window. He then knelt to put the wood through the basement window into the basement. According to the worker, the wood was relatively light (5 to 8 pounds each log) because it was dried and split, and he was only putting through the window one or two pieces at a time due to the small size of the window.

As he was doing this, the pain in his back increased. After approximately one hour of moving wood in the manner described, he had to stop because of the pain in his back.

The Panel notes that the wood-moving described by the worker did not involve heavy lifting, nor did it involve carrying the wood for a significant distance. It was a much less strenuous form of activity than the worker had engaged in in previous years when he had cut, split, thrown in and piled many cords of wood. It was a normal household activity in the northern community in which the worker lived.

The Panel also notes the worker's evidence that Dr. Dakin told him to continue trying to cope with the pain and to do his normal duties at home and work, provided he avoided heavy lifting with rotation and too much sustained posture, jolting and jarring.

On these facts, the Panel concludes that the exertion involved in the wood-moving was normal and not unreasonable in the circumstances.

Nature of the Injury and Disability After September 27, 1984:

The worker saw Dr. Moran on September 28, the day after the wood-moving incident. Dr. Moran indicated that the worker's pain was much worse than it had been in June, 1984. He indicated that his examination revealed marked tenderness and spasm over the lumbar spine muscles. According to the worker, Dr. Moran prescribed medication and physiotherapy, but these did not help. Dr. Moran arranged for the worker to be admitted to hospital. He was admitted on October 17 and remained in hospital 8 days. In hospital, he was treated with bed rest, traction and physiotherapy and his condition improved somewhat.

Subsequently, the worker was examined by Dr. James Bateman, an orthopaedic surgeon. Dr. Bateman's first report notes the April, 1984 accident at work and concludes that the worker presented symptoms and signs of post-traumatic degenerative disc disease of the lower lumbar spine. His subsequent report indicates:

"From the history of the injury at work, it is apparent that he probably partly ruptured his annulus, but not completely, and the symptoms and signs which he developed were in keeping with such a development."

The annulus is a fibrous ring forming the circumference of the disc.

Since the wood-moving incident is not mentioned in Dr. Bateman's report, his opinion does not deal with the issue of whether the wood moving incident could have caused the injury.

Compensation:

A worker is entitled to full compensation if he or she is temporarily totally disabled and the disability results from an injury which is caused by a work-related accident.

In this case, there was a work-related accident on April 10, 1984. It caused an injury of the worker's lower back. The injury was described in various ways - initially as 'acute lumbo-sacral sprain-strain' by Dr. Jarvensivu and subsequently as lumbar region 'disc injury' or 'herniated disc' by Dr. Dakin.

Did the disability suffered by the worker after the wood-moving incident result from this injury?

Drs. Dakin and Moran have expressed the opinion that the subsequent disability was caused by the April 10 injury.

Dr. Dakin's report of May 22, 1985 states: "It seems that his original injury is causing all of his problems." In his report dated October 23, 1985, Dr. Dakin explains that there may be minimal symptoms at the time of the original accident but deterioration is then inevitable. Thus, the pain experienced by the worker when he was throwing wood through the basement window was "but a small part of the inevitable deterioration of the disc."

Dr. Moran, on the basis of the reports of Drs. Dakin and Bateman, as well as his contact with the worker, stated in his report that he had "no doubt that his continuing back problems are related to his original injury." Likewise, in his report of July 29, 1985, Dr. Jarvensivu notes that the worker "prior to his injury on April 10, 1984...had no problems and was able to stack wood and do much more strenuous work on the jobsite and at home with no problem at all... Moving the wood irritated an already existing low back problem caused from the injury at work on April 10, 1984."

In November, 1984, several doctors employed by the WCB were asked to review certain facts and give their opinion as to the cause of the disability. One doctor concluded that the work at home was very significant and would appear to account for the disability. The other doctor, Dr. Doyle, indicated:

- "1. obviously there was a degree of low back impairment persisting following the compensable incident of 10 April 1984.
2. however, he was able to remain at work.
3. it seems reasonable to believe that the domestic activity of 27 September 1984 increased the degree of back impairment and was a significant factor in his layoff of 28 September 1984."

It should be noted that both of these opinions were based on a description of facts which indicated that "the worker was carrying wood into his basement at home. He carried in two cords of wood...". As previously indicated, the worker was moving the wood approximately three feet and dropping the wood through a window. It is possible that the medical opinions would have been different had the facts as accepted by the Appeals Adjudicator and this Panel been available to them.

Although Dr. Doyle's opinion concludes that the domestic activity was a significant factor in the layoff, it does not rule out the possibility that the original injury was also a significant factor. Dr. Doyle accepts that there was still low back impairment persisting following the compensable incident of April 10.

Conclusions:

The Panel has considered all the evidence and it has concluded that the disability suffered by the worker in the period from September 28, 1984 to February 22, 1985 resulted from the injury caused by the compensable accident of April 10, 1984. The worker is therefore entitled to full compensation and medical benefits during that period.

The temporary disability must "result from" the compensable injury in order to be compensable under the Act (Section 39). Thus, if the disability is a direct and natural consequence of the compensable injury, it is compensable regardless of whether or not it is triggered or aggravated by a non-employment incident.

In some circumstances, there may be some non-employment intervening cause such as a second accident which accounts for the disability. In such cases, the original injury may not be a significant cause of the disability. Such a disability would therefore not be compensable because it does not "result from" the original injury.

However, in this case, the original injury was a disc injury which, according to Dr. Dakin, could be followed by the deterioration of the disc. Even before the wood-moving incident, Dr. Dakin had indicated that the disc injury "might get worse and cause him to go out of the work force...". The evidence clearly indicates that the pain resulting from the original injury persisted even after the worker returned to work and that it worsened after the wood-moving incident. This is entirely consistent with Dr. Dakin's prognosis of the original injury. It is also consistent with most of the other evidence.

On the basis of the evidence, we find that it is unlikely that the worker would have suffered the disability which he suffered in the period subsequent to the wood moving incident had it not been for the April 10 compensable injury. The April 10 compensable injury was a significant cause of the worker's disability in the period from September 28, 1984 to February 22, 1985. Thus, although the wood-moving incident worsened the disability suffered by the worker, the disability was nonetheless a direct and natural result of the original compensable injury.

DECISION:

The appeal is allowed. The worker is entitled to full compensation and medical benefits for the period from September 28, 1984 to February 22, 1985. The Tribunal leaves to the WCB the calculation of the amount in question.

DATED at Toronto this 25 day of February, 1986.

SIGNED: A. Signoroni, N. McCombie, D. Mason

Workers' Compensation Appeals Tribunal

DECISION NO. 19

Tribunal d'appel des accidents du travail

Panel Chairman: N. Catton

Member: Brian Cook

Member: Douglas Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

February 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NUMBER 19

THE APPEAL PROCEDURE:

The appeal was considered and decided by a panel of the Appeals Tribunal consisting of N. Catton, Panel Chairman; B. Cook, a Tribunal member representative of workers and D. Jago, a Tribunal member representative of employers, sitting as a Case Direction Panel. An actual hearing was not conducted.

Case Direction Panels have the same composition as Hearing Panels. The purpose of a Case Direction Panel is twofold. The Panel will attempt to decide what issues must be dealt with in order to determine the matter before the Tribunal. In addition it will attempt to ensure that the evidence available to the Hearing Panel and the parties at the time of the hearing is sufficient to allow the Hearing Panel to come to a sound decision.

In certain cases it is possible and desirable for the Tribunal to make a decision without holding a hearing. To do so the following conditions must be met:

1. There must be sufficient evidence on which to base the decision.
2. Neither the worker's nor the employer's interest can be prejudiced.
3. The decision of the Panel must be unanimous.

If any of these factors do not apply, the case will be scheduled to be heard by a Hearing Panel which would not be aware of the opinions of the Case Direction Panel.

In this case, the Panel concluded that there was sufficient evidence to make a decision and no further relevant evidence was likely to become available at a hearing. The employer supported the worker's appeal and confirmed this in writing.

The Panel considered evidence given by the worker to the Board in writing. It also considered the relevant forms and medical reports collected by the Board, and the memoranda prepared by the Board. In addition, the Panel considered the decision and written reasons of the Appeals Adjudicator.

THE ISSUE AND HOW IT ARISES:

The worker began his employment with his present employer as a lineman in 1948. His duties involved climbing poles, repairing wires, and manually raising poles with the assistance of co-workers. Much of his work required him to use his arms above shoulder level.

According to the employer and worker, linemen were required to replace the cross arms on hydro poles. This process required linemen to climb to the top of hydro poles, lean back on their spurs with their safety belts on, swing and hit the cross arms with either the left or right shoulder. This process was carried out primarily between 1952 and 1973. In 1973, the employer introduced new equipment, including hydraulic machinery, which eventually eliminated the need for this bumping process.

In 1973 the worker was transferred from this high line work to the job of operating a service vehicle. His new duties involved mainly servicing residential customers, but the amount of above the shoulder work remained the same.

Around the time of his transfer, the worker began to experience discomfort and gradual pain in both of his shoulders. Originally his family doctor diagnosed the problem as bilateral bursitis. Medication was prescribed and the worker continued to see the physician for this problem on an irregular basis.

In 1980 the problems with his shoulders progressed and his family physician referred him to an orthopaedic surgeon. The specialist saw the worker on December 11, 1980. At that time, he noted that there was pain when either shoulders were rotated. He also diagnosed bilateral bursitis. Because the worker was anxious to avoid surgery, the specialist decided to inject the shoulder joints with steroids and a local anaesthetic.

The problem persisted and the worker saw the specialist again. In May 1981, surgery was performed to repair the left shoulder, specifically the rotator cuff. From all accounts, the surgery on the left shoulder successfully relieved the pain.

The worker then decided to proceed with surgery on the right shoulder. This surgery took place in January 1982. The diagnosis at the time of this surgery was a tear to the right rotator cuff. Because of the nature of the tear it was impossible to repair the rotator cuff but the doctor was able to decompress the cuff. Following the right shoulder surgery, there was a decreased range in movement and a significant decrease in the strength of the worker's right arm.

In 1983, the company's physician submitted a report to the Workers' Compensation Board asking it to consider entitlement for the worker's shoulder disabilities. Prior to deciding on entitlement, the adjudicator referred the matter to a surgical consultant employed by the Board. In his memorandum, the doctor noted that:

"The lack of specific incident and the interval between complaints and the size of the rotator cuff tears are in keeping with a long term result of chronic degeneration and not industrially related."

The claim was initially denied by WCB on the basis of this surgical consultant's report. The matter was appealed to an Appeals Adjudicator. At the hearing the employer's Chief Physician and Manager of Health Services appeared on behalf of the worker.

The Adjudicator found the worker had not established that an accident, as defined by Section 1(1)(a) of the Act, had occurred. In addition, the Adjudicator noted that the evidence did not establish that the worker was suffering from an industrial disease. Therefore, in his opinion benefits were not payable under the Act.

Following the Appeals Adjudicator's decision, the employer's physician referred the worker to the Chief Orthopaedic Surgeon at Sunnybrook Hospital. This doctor was provided with the worker's history and he examined the worker. In a report dated May 8th, 1985, he stated:

"It is my firm opinion that this bilateral rotator cuff problem is a work related injury."

The worker then requested the Tribunal hear his appeal.

To be entitled to benefits the worker must establish that he had an accident arising out of and in the course of his employment. In the Act, "accident" includes:

- (i) a wilful and intentional act, not being the act of the worker,
- (ii) a chance event occasioned by a physical or natural cause, and
- (iii) disablement arising out of and in the course of employment;

(Section 1(1)(a))

A worker may also be entitled to benefits if he is suffering from an industrial disease which is defined in the Act as follows:

"industrial disease" means any of the diseases mentioned in Schedule 3 and any other disease peculiar to or characteristic of a particular industrial process, trade or occupation;

(Section 1(1)(n))¹

The worker must then establish that his disability is related either to the accident or the industrial disease.

In this case there is no doubt that the worker has a shoulder disability. The unresolved questions are:

1. Is the worker suffering from an industrial disease?
2. Did the worker suffer an injury by accident as defined by the Act?
3. If he suffered either an accident or an industrial disease were either responsible for his disability?

¹ Unless otherwise stated all section references are to the sections as they existed prior to April 1, 1985.

REASONS FOR THE TRIBUNAL'S DECISION:

In his consideration of this case the Appeals Adjudicator did not refer to Section 1(1)(a)(iii) which defines accident as "disablement arising out of and in the course of employment". It is the Panel's opinion that this provision in the Act allows for the granting of entitlement for conditions that arise out of work activities when a specific incident cannot be identified. In reaching this conclusion the Panel was guided by the Board's policy.

That policy may be found in the Board's Policies and Divisional Administrative Guidelines. Specifically, Directive Number 2 states:

"Entitlement under the amending act applying to accidents happening on or after the third day of April 1963, which includes under the definition of accident "disablement arising out of and in the course of employment" requires that the disablement which the worker suffers must have some causal relationship with the work being performed, that is, it is not sufficient that the disablement comes on during work, but rather there must be something about the work which can be considered to have caused the disablement to come on, such as strenuous work, awkward positions, unaccustomed strain, or even a movement arising out of the work which is reasonable to consider has caused the disablement."

In the Panel's opinion this policy provides examples of work activities which might produce disabilities. There is nothing in the policy which suggests that specific incidents must be identified as a pre-condition to entitlement. There is also nothing in the wording of the statute that requires that a specific incident be identified.

The Panel is of the opinion that the bumping process, which was a series of movements arising out of his employment, caused significant stress to the worker's shoulders. We are also convinced that the amount of over the shoulder work would be stressful. In our opinion, these activities could be an "accident" under Section 1(1)(a)(iii) of the Act if these activities caused the worker's disablement.

After determining that entitlement might be granted under the accident definition, the Panel referred to the available medical evidence. The Panel noted that neither the family physician nor the operating orthopaedic surgeon commented on a relationship between the work and the disability.

The surgical consultant employed by the Board did not address the possibility that the work activities, as described, could have contributed or caused the disability. His opinion, therefore, was not helpful in assessing the claim for benefits.

The only doctor who did specifically address the issue was the Chief of Orthopaedic Surgery at Sunnybrook Hospital. The history of work activities he described was consistent with the history accepted by the Panel. We therefore accept his opinion that a relationship existed between the work performed and the shoulder disabilities.

The Tribunal also accepts the evidence of the employer. Two physicians employed by the employer clearly indicated their support for the allowance of this claim. Not only did one doctor appear on behalf of the worker before the Appeals Adjudicator, but another doctor initially submitted the claim for entitlement to the WCB.

There was no evidence available to the Panel to suggest that the worker was suffering from an industrial disease. To establish the existence of an industrial disease not listed in Schedule 3, the Panel would have had to assess the effects of the work activities of more than one lineman. This was not necessary in this case.

The Panel is satisfied that the worker's disability was injury by "disablement arising out of and in the course of employment". As such, it was an injury by accident and compensable under the Act. The worker is, therefore, entitled to compensation for any disability resulting from the injury. The Panel finds that the disability suffered by the worker during the period of layoff for surgery for both shoulders resulted from the injury.

DECISION:

The appeal is, therefore, allowed and the Workers' Compensation Board is directed to pay the worker temporary total compensation benefits during the period of lay-off for surgery for both the right and left shoulder.

The Tribunal leaves to the WCB the calculation of the amount in question. Also, there is evidence that, in particular, the right shoulder may have been permanently damaged resulting in a loss of function in the right arm. In light of such evidence, we are of the view that the Board should assess the worker for any possible entitlement to a permanent disability award.

DATED at Toronto this 18th day of February 1986.

SIGNED: N. Catton, B. Cook, D. Jago.

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Workers' Compensation Appeals Tribunal

DECISION NO. 20

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: L. Heard

Member: K. Preston



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

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WORKERS' COMPENSATION APPEALS TRIBUNAL
INTERIM DECISION #20

THE APPEAL PROCEDURE:

The worker appeals the April 29, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, Mr. G.R. Linklater.

The appeal was heard on January 17, 1986, by a panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, L. Heard, a member of the Tribunal representative of workers and K. Preston, a member of the Tribunal representative of employers.

The worker appeared and was represented by Mr. G. Nolis of the Office of the WCB Workers' Adviser. The employer was represented by Mr. B. Hayward, Office Personnel Manager. Mr. E. Grisolia appeared on behalf of the Tribunal's Counsel Office.

The Panel read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description materials.

The Panel also read the Case Description recital of facts prepared by the Tribunal's Counsel Office. Both the worker's representative and the employer's representative had an opportunity to see the case description prior to the hearing and to make submissions on it. General submissions were made by the worker's representative and by the employer's representative.

THE ISSUE AND HOW IT ARISES:

In this case the Panel has decided that further medical evidence is necessary. This decision outlines the nature of the evidence before the Panel and our reasons for coming to this decision.

The worker's appeal arises from the decision of the Appeals Adjudicator that the worker was not entitled to compensation for a left knee disability after October 12, 1983. The Adjudicator made his decision on the basis that the condition could not have reasonably resulted from the worker's compensable injury on June 8, 1983.

A brief review of the facts in the case is as follows. The worker had several injuries to his left leg including a gun shot wound in 1944 which fractured the tibia and fibula. He also had a compensable injury in November, 1973, when he hit his left leg on the corner of a skid. In November, 1977, the WCB rejected a left knee injury claim as not being employment related. X-rays at the time indicated mild degenerative arthritis in the knee. In May, 1979, the worker suffered a compensable sprain to his lumbar spine for which he was granted a permanent disability pension in 1981. In addition, further left leg problems were noted in 1979, including chronic post-phlebitic syndrome with stasis dermatitis, chronic swelling of the leg and multiple varicosities. Minimal degenerative osteoarthritis was observed in the left patella (knee).

In May, 1982, the worker twisted his left knee and also suffered a left lumbo-sacral contusion. Degenerative disc disease was diagnosed in the lumbar spine. Compensation was granted for three months. In October, 1982, a medical report indicated degenerative arthritis in the left knee.

The final accident and the one giving rise to this appeal occurred on June 8, 1983, when the worker slipped and twisted his left knee while trying to prevent himself from falling. WCB compensation was granted for medical aid only. The worker saw his family doctor, Dr. Mihic, on June 11, 1983.

The worker did not lose time from work following the incident, although he was on vacation from July 11, 1983, to August 5, 1983, during which time the worker states that he rested his knee and did not engage in strenuous activity. On his return to work, he suffered increased pain and eventually discontinued work on October 12, 1983. The worker has been unable to work since that time.

The worker's representative, Mr. Nolis, acknowledged that there were underlying problems and several accidents involving the left knee. He argued, however, that the incident of June 8, 1983, aggravated the worker's left knee condition from May, 1982, and resulted in the worker being totally disabled after October, 1983. Mr. Nolis referred to Dr. Mihic's report of January 15, 1984, which stated that the lost time after October, 1983, was definitely due to the aggravation caused by the June, 1983, accident.

The employer's representative, Mr. Hayward, noted that the medical reports indicated that the worker had other problems including underlying degenerative osteoarthritis which may well have accounted for him being off work after October, 1983, rather than the June, 1983, accident. Mr. Hayward also noted that the worker did not complain to the Company's Medical Department following his return to work in August, 1983, and noted that he laid off work just prior to a strike at the Company on October 16, 1983. Mr. Hayward referred to the WCB investigation report that his co-workers, while aware of knee problems, stated that the worker had complained for five to six years prior to 1983.

The main issue for the panel, therefore, is whether the accident in May, 1982, and June, 1983, aggravated the worker's left knee condition to the point where he was totally disabled after October, 1983, or whether his disability results from non-compensable pre-existing problems.

THE PANEL'S REASONING:

After hearing the submissions of both parties, the panel suggested that the hearing be adjourned in order to obtain answers to certain questions from an appropriate medical specialist, in accordance with Section 86h(1) of the Workers' Compensation Act.

The Panel made this suggestion for the following reasons:

1. Dr. Mihic treated the worker five to six times per year for his knee problems since October, 1977. Dr. Mihic, a family practitioner, is also the only doctor who definitely related the worker's lay-off after October, 1983, to the June, 1983 accident.

2. There are a number of medical reports included in the materials which indicate that the worker had problems with his left knee beginning in 1977 and osteoarthritis in the left knee which was first noticed in X-ray reports in May, 1979.
3. During the period from August, 1983, to October, 1983, the worker complained to his doctor of excruciating back pain as well as knee pain. The worker claimed he injured his back in June, 1983, several days after he injured his left knee.
4. One doctor related the worker's knee condition to the old gun shot wound.

The Panel is of the opinion that some medical expertise and input is required in order for it to consider adequately the issue under appeal. The medical questions are complex and the records on file do not provide enough assistance for the panel to determine the issue before it.

The worker consented to the procedure and consented to undergo a medical examination in the circumstances outlined.

DECISION:

The decision of the Panel is reserved pending the receipt of further medical evidence. The Tribunal's Counsel, with input from both parties, is to contact a medical counsellor who is a specialist in orthopaedics who will:

1. Advise what type or types of specialists are required for the referral, and
2. Advise as to what information and reports should be forwarded to the specialist.

Once the parties have agreed on the questions with the help of the medical counsellor, the Tribunal's Counsel is to select the consulting specialist after consultation with the parties. The specialist will be asked to review the information and reports, to examine the worker, and then, to provide responses to the questions agreed upon.

The Panel agrees that these general questions should be put to a specialist:

1. How likely is it from a medical point of view that the twisting type of injury in June, 1983 resulted in the worker's present condition and his prolonged disability?
2. How much, if at all, did the 1982 injury contribute to the disability after October, 1983?
3. How much, if at all, could the lower back problems be interfering with the worker's left knee problem?
4. How much is the underlying osteoarthritis likely to be contributing to the disability?

5. How likely is it that the other left leg conditions (the gun shot wound and varicose veins) are contributing significantly to the disability after October, 1983?
6. Any other questions that are suggested by the medical counsellor and agreed upon by the parties.

If there is any disagreement as to the specific questions to be put to the specialist, this Panel is to be reconvened to determine the issue.

Once the consulting specialist's opinion is obtained and distributed to the parties and to the Panel, the hearing will be reconvened before this Panel. The Tribunal's Counsel is directed to organize the further hearing.

DATED at Toronto this 3rd day of March , 1986

SIGNED: L. Bradbury, L. Heard, K. Preston

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Publications

Workers' Compensation Appeals Tribunal

DECISION NO. 22

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: N. McCombie

Member: K. Preston



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #22

THE APPEAL PROCEDURE:

The worker appeals the August 21, 1984, decision of the Workers' Compensation Board appeals adjudicator, M. Prpic, denying entitlement for hearing loss.

The Appeal was heard on January 20, 1986, by a panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, N. McCombie, a member of the Tribunal representative of workers and K. Preston, a member of the Tribunal representative of employers.

The worker appeared and was represented by Mr. R. Lebert, UAW Local 444. Mr. A. Krueger attended on behalf of the employer. The Tribunal was assisted by M. Faubert who appeared in the role of the Tribunal counsel.

The Panel heard and considered evidence given under oath by the worker and by Mr. Krueger from the employer company and read the relevant forms, memoranda and reports extracted from the WCB file and collected in the Case Description Materials which were marked Exhibit "1" to these proceedings. It also read the Case Description recital of facts prepared by the Tribunal Counsel Office. Submissions were made by the worker, by the employer's representative and by Tribunal counsel.

THE ISSUE AND HOW IT ARISES:

The worker was employed by an automotive manufacturing company from March 29, 1965, to May 31, 1976. His occupation was millwright. This involved maintenance of machinery in the automotive plant. For the first 6 years of his employment with the company, he performed maintenance work throughout the plant. For the last five years he was located in the "index-in" area of the plant where the sides of the auto body are put together.

Prior to his employment with the automotive company he worked in various maintenance and construction jobs, including an 18 month period with a mining company. He indicated that, prior to his employment with the automotive company, some of his jobs were noisy but he was never exposed to noise as loud and continuous as the noise he experienced during his 5 years in the "index-in" area. The worker states that the noise in the "index-in" area was caused by the combination of the manufacturing operations taking place in the area, including spot welding, hammering, and solder grinding. He particularly noticed the solder grinder which he estimated was about 15 feet from work station. The spot welder was about 6 feet away and the hammering took place at the spot welding station. He testified that the grinding operation was done in the open.

His first hearing loss symptoms were experienced after he retired from the automotive company. The symptoms included a loss of hearing and ringing in the ears. He states his condition has become progressively worse. A report from Dr. Lan, an otolaryngologist, confirmed a hearing loss of approximately 45 db as of June 28, 1982. There appear to be no noise level studies available for the period of time that the worker was employed by the automotive company.

The Occupational Health Branch of the Ministry of Labour carried out two noise level assessments in the plant in the spring of 1983, which reports were included in the Case Description Materials.

The record of noise levels in the "index-in" area where the worker spent five years, as of May 31, 1983, was measured between 82 and 85 db.

Mr. Krueger testified that he is familiar with the noise levels at the plant. He has worked with the automotive company since 1965 and it was his opinion that the noise levels as measured in 1983 would be similar to the noise levels in the plant when the worker was employed with the automotive company.

Mr. Krueger on behalf of the automotive company, conceded that the worker's hearing loss was sufficient to entitle him to benefits under the Workers' Compensation Act if it were established that the worker had sufficient exposure to industrially induced noise. He agreed that the worker had been employed in the "index-in" area for approximately 5 years. The employer's position, quite simply is that the noise level was not high enough to meet the Board guidelines, which require exposure to 90 dB of noise 8 hours a day for 5 years. The worker has not been exposed, in Mr. Krueger's submission, to a 90 dB noise level while working in the "index-in" area of the plant.

THE PANEL'S REASONING:

During the hearing, the worker and Mr. Krueger were questioned by Mr. Lebert on behalf of the worker, by Ms. Faubert and by the Panel members. The Panel finds both the worker and the employer representative to be credible and honest witnesses and accepts their evidence. There is uncontradicted evidence from Dr. Lan, the otolaryngologist, that the audiograms support a finding that the worker's hearing loss is noise induced. The worker testified that his previous employment situations were somewhat noisy. However, he stated there was nothing special about his personal life that would cause noise induced hearing loss. He is not involved in outdoor sports, he does not have noisy hobbies, and his family has no history of ear problems. Accepting the worker's evidence on these points, raises the inference that his hearing loss is an industrial disease which arose out of and in the course of employment.

In the case of noise induced hearing loss, there is a relationship between hearing loss and the extent of exposure to loud noise. Indeed, the regulations made under the Occupational and Safety Act prescribe daily exposure maximums where the worker is exposed to a sound level of 90 decibels or greater. As the sound level increases, the daily exposure duration decreases. The Board, in accepting this relationship, has added the requirement that where the exposures as set out in the Occupational Health and Safety Regulations are exceeded for a period of 5 years or more, and noise induced hearing loss results, the worker will have established entitlement to benefits.

The Occupational Health and Safety regulations, and the Board policy, do not contain provisions for sound levels lower than 90 decibels. However, the Board's Policy Directive #19, paragraph 2.2 does provide for consideration of particular circumstances, as follows:

"since individual susceptibility to noise varies, claims which do not meet the criteria set out (above) are individually judged on their own merit having regard to the nature of the occupation, the extent of exposure, and any other factors peculiar to the individual case. The benefit of doubt applies".

In assessing the individual factors in this particular case, we note the following:

- 1) there are no noise level studies for the particular period of time in question. Mr. Krueger did not feel that there had been any significant changes between the time the worker was employed in the "index-in" area and the time the noise level studies were performed in 1983.

However, the worker specifically recalled that the grinding area was not enclosed whereas Mr. Krueger's recollection is that the grinding area has always been enclosed. There is no doubt that the grinding area is noisy. In 1983, the noise figures ranged from 90 to 100 db in the grinding booths.

- 2) Reports of investigators from the Occupational Health Branch confirmed the fact the company as of 1983, had a hearing conservation program in place. The evidence at the hearing was to the effect that when the worker was employed in the "index-in" area, there was no noise abatement or hearing conservation program. It is reasonable to conclude that noise measurements after a hearing conservation program has been implemented would not have been higher than before the program was implemented. Indeed, it is possible that noise levels measured in 1983 might be lower than they would have been in 1976 because of hearing conservation programs.
- 3) It was suggested by the Occupational Health Branch that "it is conceivable through various modification programs and model changes that noise sources and profiles could have been slightly altered in this plant from the 1968 to 1975 era to at present."

The above factors suggest to this Panel that a measurement of 82 to 85 decibels in the "index-in" area would be the minimum noise level the worker experienced during his 5 years in the index-in area and it is indeed possible that the noise levels were somewhat higher than that, particularly if the grinding area was not enclosed, as was stated by the worker.

Another factor to be considered is the subjective nature of noise levels. For example, Mr. Krueger was questioned about another area of the plant, referred to as jounce testing. The 1983 noise level tests concluded that in this area, where earplugs are worn a peak decibel reading of 130 db was obtained and an average decibel reading was in the range of 102 to 107 db. It was Mr. Krueger's testimony that the jounce testing area is not the noisiest area in the plant. He stated that there is more continuous noise in the "index-in" area which, as already been mentioned, had a much lower noise level rating of 82 to 85 db.

Mr. Krueger's testimony as to his own perception of noise levels in various parts of plant demonstrates how difficult it is to draw precise conclusions about the relationship between measured noise levels and individual susceptibility to noise. It is this subjective factor which perhaps has given rise to the Board's policy to treat individual cases which do not meet the standard criteria on an individual basis.

Indeed, in Ms. Faubert's submission, reference was made to a document entitled "the Designation of Noise in Ontario - Volume 1", a publication by Occupational Health and Safety Division of the Ministry of Labour - November, 1982. On page 3.9 of that article, there is the description of the relationship between noise exposure and hearing loss. Specific reference is made to the difference between the risk of hearing loss at 85 decibel exposure and 90 decibel exposure. At page 3.11 one of the studies performed by NIOSH¹ concludes that "at retirement, 30 workers in 100 would have impaired hearing following occupational exposure to 90 db of continuance sound during the working day, as compared with 15 workers in 100 exposed to noise levels of 85 db". In other words, a noise exposure of 85 db, although less risky than 90 db, would still produce hearing loss in a certain proportion of a population. As we have said, the worker was exposed for a period of 5 years to at least an 82 to 85 db level.

We also note that the worker was employed 6 days a week in the "index-in" area for an 8 hour day. We do not know what effect, if any, an extra day a week would have on increased risk, but one can only assume that since the duration of exposure has been taken by the Board as one of the factors to be considered (i.e. 5 years) the fact that the person has been exposed to a noisy environment for 20% longer each year suggests a lower length of exposure is required to meet the Board policy or, if exposure is indeed 20% greater each year for 5 years, a lower amount of continuous exposure is required.

We further note, that prior to commencing work at Chrysler and indeed, we understand prior to his audiogram in 1982, the worker's hearing was not tested. We also note that the worker was exposed to other (less) noisy environments for many years prior to his employment with the automotive company.

The Appeals Adjudicator decision concluded that the worker had not established sufficient exposure to hazardous noise to meet the Board's guidelines for industrial hearing loss. It would appear that the Appeals Adjudicator may not have considered the particular circumstances which are unique to this worker, as is required by the Board's Policy Directive #19, paragraph 2.2. We concur with the Appeals Adjudicator that the worker does not meet the guidelines specified in paragraph 2.1. However, we are satisfied that in the unique circumstances of this case, the worker's noise induced hearing loss was caused by his exposure to industrial noise.

¹National Institute of Occupational Safety and Health

THE DECISION:

The appeal is allowed. The Panel finds that the worker's exposure to noise with the automotive company caused his noise induced hearing loss.

The Panel leaves to the Board the determination of the amount of benefits to which the worker may be entitled.

DATED at Toronto this 18th day of March, 1986.

SIGNED: J. Thomas, N. McCombie, K. Preston

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Workers' Compensation Appeals Tribunal

DECISION NO. 23

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: F. Lankin

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 23

THE APPEAL PROCEDURE:

The worker appeals the May 30th, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, F.H. Kaliciak, who upheld the November 13th, 1984, decision of the Claims Review Branch.

The appeal was heard on January 21st and February 13th, 1986, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, F. Lankin, a member of the Tribunal representative of workers and D. Mason, a member of the Tribunal representative of employers.

The worker appeared and was represented by C. Elwell, Student at Law. The employer elected not to appear. The Tribunal was assisted by D. Munro, a member of the Tribunal Counsel Office, who appeared in the role of Tribunal Counsel.

The Panel heard and considered evidence given under oath by the worker in oral testimony; testimony under oath of the worker's union's business agent and the worker's brother -- who were called to give testimony by the worker; and testimony under oath given by a fellow employee of the worker, the supervisor of the worker and the bookkeeper/personnel clerk of the employer -- who were subpoenaed to testify by the Tribunal upon request of the worker.

The Panel also read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials and had the benefit of a recital of the facts and history of the claim as it appears in the Case Description and was agreed to by the parties. These materials were marked as Exhibit #1 at the hearing.

A letter from the employer dated January 10th, 1985, and addressed to D. Munro of the Tribunal's Counsel Office was received and marked as Exhibit #2. The worker's representative submitted additional materials including a record of employment, doctors letters and theoretical material which were marked as Exhibits #3 and #4.

Submissions were made by the worker's representative and the Tribunal counsel.

THE ISSUE AND HOW IT ARISES:

The worker was employed with the employer through a union hiring hall from October 4th, 1984. The worker's profession is that of carpet layer and his work for this employer involved the laying, repairing and patching of carpets in large office buildings and industrial sites.

The appeal arises out of the worker's claim that an accident occurred at work on October 9th, 1984, resulting in an injury to his low back. The worker's testimony regarding the incident and the period leading up to his filing of a claim with the WCB is as follows.

On Tuesday, October 9th, 1984 the worker was working with his brother, who was also employed by the same employer, and one other co-worker repairing carpets in a large downtown office building. The three were reseaming carpets which had been cut to facilitate access to and rewiring of electrical floor outlets. This work necessitated the moving of any office furniture which had been positioned over areas of the carpet requiring reseaming.

During the afternoon of the day in question the co-worker was reassigned to another job site, leaving the worker and his brother to complete the work. Some time between 2:30 and 3:00 p.m. the worker and his brother were moving a filing cabinet and its contents weighing approximately 200 - 300 lbs. without the aid of any mechanical device. While moving the cabinet the worker experienced the sudden onset of a sharp pain in his low back.

The worker immediately complained of the pain to his brother. Shortly after the injury occurred the two took their regular afternoon coffee break which gave the worker an opportunity to sit down and rest his back. The worker testified that he initially thought the injury was probably a minor pulled muscle and that he could "work it off". He worked out the rest of the day, alone with his brother, to his normal quitting time of 4:00 p.m.

That evening the worker treated his back with a hot bath and general rest. The next day the worker's back was still paining him but he reported to work and spent the day working with his brother doing 'light work'. The worker had a conversation with his supervisor at some point during the day, during which the supervisor asked if the worker and his brother were available to work overtime on Saturday. The worker responded that he was available and would work. The worker testified that he did not report the injury to his supervisor at this time as he still felt it was a pulled muscle which he could work off.

The worker went home and rested his back again that evening. The next day the worker was still experiencing pain but he reported for work as he knew his assignment for the day was to a job location where he anticipated the work involved would again be 'light work'.

The worker testified that for a part of the day he did in fact perform heavier work and that he complained of his back pain that day to his co-worker. He worked his full shift and left work at 4:00, intending to return to work the next day, as he left his tool box at the job site which was some distance from the home base work location.

The worker testified that by the next morning (Friday, October 12th) when he arose, the pain in his back had worsened to a degree that he drove to the Emergency Department of Toronto Western Hospital to seek treatment. The hospital report indicates the worker was seen at 6:45 a.m. and discharged at 8:10 a.m. The report, filled out with information provided by the worker, dates the occurrence of the injury as October 9th, 1984, at 2:30 p.m. at work while lifting and moving a filing cabinet. He was diagnosed as having mechanical low back pain and bed rest and medication was prescribed by the attending physician.

The worker stated he returned home and called in to the employer's office and spoke to the bookkeeper/personnel clerk. He informed her of the fact that he had injured his back on October 9th and would not be in to work. He requested that WCB forms be sent to him to fill in. The worker testified that the bookkeeper responded that she would get back to him and that he did not hear back from her that day.

That evening the worker received his separation papers from the employer and the reason for layoff indicated was shortage of work. The worker followed the prescribed course of treatment over the weekend. On Monday, October 15th, 1984, the worker called the employer's bookkeeper to inquire about obtaining WCB forms because they were not included with the separation forms he had received and he was informed that the employer felt there was no evidence of a workplace injury to his back and they would not be filing a report of injury.

That same day the worker called to arrange an appointment with his family doctor and reported his injury directly to the Workers' Compensation Board. The summary of that report is noted in the Board's Report of New Claim dated October 15th, 1984.

On Tuesday, October 16th, 1984, the worker saw his family doctor and was diagnosed as suffering disc prolapse with sciatica. The treatment prescribed was bed rest and medication. The prognosis indicated the worker would be unable to return to work for one month.

The Panel also heard testimony from the worker's brother as to how the accident occurred, and how the accident was reported. There was evidence given by the brother that on Friday, October 12th, 1984, he informed the supervisor that the worker's back had been bothering him since moving filing cabinets on Tuesday, October 9th, 1984, and that the worker had gone to see a doctor that day. The brother stated that later on that day he received the worker's separation papers and final cheque from the supervisor.

The brother himself worked on the Saturday on overtime at which time the worker's back injury was discussed by the supervisor, the co-worker and the brother. It is the brother's evidence that at that time he informed them that the worker was intending to file a compensation claim. On Monday, October 15th, 1984, the brother received his own separation forms and final cheque and was also laid off because of shortage of work.

The Panel heard from the co-worker that on Thursday, October 11th, 1984 he was assigned to an off-site work location with the worker and that a conversation took place during which the worker complained about the job. He testified that he really did not pay much attention and is not sure whether or not the worker said anything about his back pain or a work place accident. He continued his testimony saying that "I wasn't listening to him. I just don't like listening to that stuff".

There was also evidence given by the co-worker that on the Saturday of overtime, he participated in a conversation with the worker's brother and the supervisor with regard to the worker's back injury, to the effect that it was work related and that the worker was intending to claim compensation.

The supervisor gave evidence regarding the various assignments of the worker, his brother and the co-worker and the nature of work they were required to perform. He testified that on Friday, October 12th, 1984, he had a discussion with the worker's brother with regard to the worker's absence, during which he was informed of the fact that the worker was suffering back pain but denies being told that the injury was work related.

His testimony details the decision to lay off the worker and subsequently the brother and that the reason for lay off was shortage of work. He does not recall having any conversation with the worker's brother and the co-worker on the Saturday morning during which the issue of the worker's back injury or the fact that it was work related was raised. He further states that he was not at any time informed that the worker wished to pursue a compensation claim until Tuesday, October 16th, 1984, at which time he was informed by the bookkeeper in the administrative office.

The bookkeeper/personnel clerk's testimony differed greatly from the worker's evidence. She testified that she did not receive a call from the worker on the Friday informing the employer that he would not be in to work. She also states that she did not receive a phone call from the worker on the Monday. According to her testimony, the first she became aware of the worker's claim that he had suffered a work place injury was on Tuesday, October 16th, one full week following the date of the alleged incident, when the worker phoned to request WCB forms.

The union business agent gave testimony with regard to the nature of the industry and the fact that there is a high incident rate of back and knee injuries sustained by workers in this profession. He elaborated that this profession is regarded as the second highest risk for long term disability insurance in the more general construction industry.

At the Appeals Adjudicator hearing the Adjudicator held that:

"It has not been established that he suffered personal injury to his lower back by accident arising out of and in the course of employment on October 9th, 1984."

In reaching this conclusion the Adjudicator gave consideration to the delay in seeking medical attention and the delay in reporting, along with the conflicting statements of the worker and those he purports to have reported the injury to, about when they actually became aware of his disability and the cause of it.

The issue before the Panel, therefore, is whether or not the worker suffered personal injury by accident arising out of and in the course of his employment on October 9th, 1984.

THE PANEL'S REASONING:

During the hearing the worker and the five other witnesses were questioned by the Panel as well as by D. Munro of the Tribunal Counsel Office. Submissions were made by the worker's representative and by Tribunal counsel.

With regard to the 1984 incident there is no doubt about the fact that the worker did suffer a personal injury to his low back for which he received ongoing medical attention and rehabilitative treatment.

Medical evidence contained within the Board's file dated April and May of 1985, suggests that the worker may not be able to return to his former employment. A May 2nd, 1985, report from Dr. Daniel Wu specifically recommends "retraining for him to change to a more realistic employment for the rest of his life."

The Panel is satisfied that there is a strong relationship between the nature of the injury and disability and the incident as described. Thus the problem confronting the worker in having the Panel accept his evidence that the incident occurred as alleged is the absence of an independent witness to the incident and a delay in reporting the incident to the employer or to a doctor.

A delay in reporting will often raise an inference that the incident did not occur as alleged. Workers who sustain injuries which are sufficiently serious to require them to take time off work have usually experienced a remarkable or unforgettable incident which gave rise to the injury. It is, therefore, reasonable to expect that the incident will be reported to the employer as soon as it happens and that medical attention will be sought for the injury. In some circumstances a delay in reporting may raise an inference that some other incident, possibly not work related, caused the disability.

The delay in seeking medical attention adds to the worker's problems in that it is reasonable to expect that in most cases, people seek medical attention promptly for injuries which are sufficiently serious to disable them from work. In this case there was an admitted delay in seeking medical attention of two and one-half days.

The Panel heard evidence that the worker had been employed for some seventeen years in a profession in which workers often suffer personal injury of varying degrees as a result of the work being performed. Given the facts as they were presented in this case and the nature of the injury, we find the worker's explanation for the two and one-half day delay in seeking medical attention both reasonable and credible.

The Panel, in giving consideration to the delay in reporting, found that the testimony of the various witnesses to the issue of 'when the worker officially reported the incident', was not very helpful in assisting us to arrive at a conclusion with regard to that question.

Without going into the detail of each witnesses' testimony and the conflicts contained therein, the Panel is satisfied that at the latest, by Saturday, October 13th, 1984, the employer was aware of the worker's injury and the allegation that it arose out of a workplace accident.

In arriving at this conclusion the Panel gave consideration to the evidence put forward by the worker's brother and the co-worker who testified that on the morning of the Saturday, they participated in a conversation with the supervisor which specifically dealt with the worker's back injury, that it was alleged as work related and that the worker was intending to pursue compensation benefits.

There was also evidence that the co-worker who was in a quasi-supervisory role on Thursday, October 11th, 1984, was told of the October 9th incident but "didn't want to hear about those kind of things". The co-worker, who testified before this Panel, originally told the WCB investigator in late October that he had received absolutely no complaints from the worker about a back problem on October 11th, 1984. At the Appeals Tribunal he was less definite. He felt that it was possible that the worker might have told him about his back problem on October 11th, 1984.

The Panel also heard evidence from the worker's brother that he told the supervisor on Friday about his brother's back problem and that it was related to a work incident. The supervisor, who also testified, admitted that by Friday he was aware of the worker having a back problem but he testified that he was not aware that it was work related.

In any event, the delay in reporting is two to four days depending on which version of the events actually occurred. The worker's explanation as to why there was a delay in reporting is the fact that he hoped it would go away. He had recently commenced employment with this particular employer, and he did not want to cause problems. He thought he could work it off and certainly the day after the alleged incident he was on "light work" which did not bother his back as much. It has after completing a heavier day of work on Thursday, October 11th, 1984, that he could not continue to work and sought medical attention early the next morning. We are satisfied that the worker has provided a reasonable explanation as to why he delayed in reporting and that this explanation rebuts any inference the delay in reporting otherwise might create.

Having satisfied ourselves that the delay in reporting and seeking medical attention was reasonable, the Panel turned to the evidence on whether or not the injury arose out of an accident which occurred in the course of employment, as described by the worker.

As previously indicated, the only witness to the incident was the worker's brother, whose testimony corroborated the worker's description of the injury.

In some situations, the familial relationship of the only corroborating witness may give the Panel reason to question what weight to give to the evidence. In the Technical Appendix to the Workers' Compensation Appeals Tribunal Decision #4, the Panel discusses evidence provided by a worker's wife and daughter.

In that case the worker's wife and daughter were called as witnesses for two purposes. One was to show the worker told a consistent story to various people immediately following the incident. The other was to introduce evidence about the worker's character and, particularly, his general reputation as a man of integrity.

The Panel, in that case, commented as follows:

"The evidence on the first point would likely be excluded by a court as self-serving evidence but it is not without some weight and we say no more about it. The Panel is doubtful, however, whether evidence on the latter point ought to have been heard and thinks that the admissibility of such evidence in future cases deserves careful consideration with a view to excluding it."

In the case before this Panel, the evidence introduced in testimony by the worker's brother addressed substantive issues beyond either of the points commented on in Decision #4. The worker's brother in this case was also his co-worker at the time of the incident. The Panel is of the opinion that this evidence should not be completely discounted as self-serving soley because the witness is the worker's brother.

The brother's evidence tends to corroborate the worker's version of how the accident occurred and the events that followed. Although there was some inconsistency with respect to the precise time of the accident, we are satisfied that the brother truthfully recalled as best he could the events of October 9th, 1984 that gave rise to the disability.

The weight to be given to this evidence must be considered in light of the rest of the evidence heard by the Panel. In this case none of the testimony of other witnesses suggested any knowledge of the incident not occurring as the worker described or any other possible cause of the worker's injury. Rather, in each case, the evidence introduced by the other witnesses was to the issue of delay in reporting.

A review of all the evidence contained within the Board's file and the response to questioning of witnesses at the hearing itself offers no suggestion as to a contrary cause of the injury.

The Panel, therefore, is presented with uncontradicted evidence by the worker and his brother with regard to the occurrence of the accident and the injury sustained by the worker.

The Panel is satisfied, based on the medical evidence before it, that there is a significant causative relationship between the nature of the injury and the description of the incident. The testimony of the worker's brother, co-worker and supervisor all supported the worker's description of the type of work he was performing on the 9th of October, 1984.

Weighing all the evidence before it, the Panel finds that the worker's disability resulted from the injury caused by the work accident of October 9th, 1984.

DECISION:

The appeal is allowed. The worker is therefore entitled to compensation benefits and medical aid for the low back disability resulting from the October 9th, 1984 workplace accident.

The Panel leaves to the Board the determination of the amount of such compensation.

DATED at Toronto, Ontario this 1st day of April, 1986.

SIGNED: J. Thomas, F. Lankin, D. Mason

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Workers' Compensation Appeals Tribunal

INTERIM DECISION NO. 24

Tribunal d'appel des accidents du travail

Panel Chairman: S.R. Ellis

Member: B. Cook

Member: R. Apsey



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

INTERIM DECISION #24

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WORKERS' COMPENSATION APPEALS TRIBUNAL

INTERIM DECISION #24

THE APPEAL PROCEDURE:

The employer appeals the May 30, 1985, decision of the Workers' Compensation Board's Appeals Adjudicator, W.A. Paavola.

The first hearing before the Appeals Tribunal took place on January 21, 1986, before a panel of the Appeals Tribunal consisting of S.R. Ellis Chairman, B. Cook a member of the Tribunal representative of workers, and R. Apsey a member of the Tribunal representative of employers.

The worker did not appear at the hearing, but was represented by E. Pukitis of the WCB's Worker Adviser Staff. Mr. Pukitis presented to the panel a written authorization signed by the worker, authorizing Mr. Pukitis to represent the worker in the worker's absence. The employer appeared in the person of William Morton, and was represented by Thomas M. Davis, Barrister and Solicitor. Jack Siegel appeared as the Tribunal's counsel. The employer is a Schedule II employer.

At this first hearing two significant preliminary issues arose which the panel concluded should be dealt with before the hearing proceeded and which were important enough to require a reserved decision with written reasons.

Accordingly, the hearing did not proceed to deal with the substance of the appeal, but was adjourned so that the panel might dispose of those two issues. This decision is an interim decision dealing with the two preliminary issues.

THE FACTS:

To understand the panel's reasoning in respect of both of these issues and its decision, it is necessary to know the factual context in which they arise.

The parties have agreed that the history of the claim set out in the Case Description is a reasonable exposition of the basic facts. It reads as follows:

1. The worker, aged 22 at the time, was employed as a seaman on the employer's ship. On September 24, 1980, he was scheduled to work a split shift from 8:00 a.m. - 12:00 noon and 8:00 - 12:00 midnight. His work during the morning shift had involved scraping paint and repainting, with a co-worker.
2. At noon, when he came off his shift, he had lunch, took a shower and went to bed. He had a single room and a bed, two and one half to three feet off of the floor.

3. The worker has stated that he remembers going to bed at that time, but does not recall going to sleep. He failed to show up for his second shift, and when a co-worker came to get him his room was found to be locked from the inside. Another crewman had to come and open the door, and the worker was found on the floor, his left leg pinned underneath him. He was unconscious or semi-conscious. Smelling salts were used to revive him and he was taken to hospital in St. Catharines.
4. There is a large number of medical reports from these hospitals in the file. In summary, these reports diagnose the worker as having suffered from the following conditions:
 - (a) Marked left leg edema requiring fasciotomy secondary to prolonged ischemia (blood circulation in the leg had been cut off for a prolonged period of time, resulting in a fluid build-up in the leg so severe as to require surgery to relieve the pressure).
 - (b) Acute renal failure, presumed due to rhabdomyolysis (kidney failure, possibly due to breakdown of muscle tissue emanating from the leg injury).
 - (c) Lower gastrointestinal bleeding.
 - (d) Coagulopathy (defect of the blood clotting mechanism).
 - (e) History of seizure (one report of the incident seems to indicate that he was foaming at the mouth when found - contradictory evidence exists).
5. The worker has stated that he has a prior history of drug abuse, as well as of alcohol dependency. He denies that he had been using any such substance at the time, a statement supported by his co-workers, who were unaware of any such conduct. Possession of alcohol aboard the ship, like possession of non-medicinal drugs, was a firing offence. Members of the crew admit that alcohol was sometimes brought on board in spite of this, but uniformly stated that this was not the case around the time of the incident. The worker's room was searched, but no contraband was found.
6. The cause of the worker's condition remains unclear from the medical materials. There are references therein to the possibility of a nephrotoxin (a substance poisonous to the kidneys) being present in his system, but there is other material which suggests that the kidney failure was related to rhabdomyolysis (the breakdown of crushed muscle tissue), and this would suggest that the kidney failure was a result, rather than a cause of the incident.

First Preliminary Issue: Failure Of The Worker To Attend The Hearing

HOW THE ISSUE ARISES:

The first issue arises because of the failure of the worker to attend the hearing. The worker currently resides in the Province of Quebec. At the request of the employer, the Appeals Tribunal issued a summons to the worker pursuant to its powers under Sections 81 and 86m of the Workers' Compensation Act, as revised. The employer took the steps necessary under the Ontario Interprovincial Subpoenas Act to make the summons enforceable in the province of Quebec and attempts were made to serve the summons in the city of Montreal.

A Montreal bailiff attended at the worker's residence, at the home of the worker's mother, and at a third address where it was understood the worker might be located. Five separate attempts to serve the subpoena were made without success. The bailiff's affidavit indicates that he believes that the worker was attempting to evade service of the summons.

At the hearing before this panel, the worker's representative indicated that he had been in touch by telephone with the worker prior to the hearing and had been told by the worker that he did not intend to come to the hearing unless the summons was in fact served on him. The worker then forwarded to his representative the hand-written authorization to which reference was made earlier. It may be noted that the return address on that authorization is the same as one of the addresses referred to in the bailiff's affidavit.

The employer's position is that it is entitled in the circumstances of this case to have the worker come before the Appeals Tribunal and testify about the circumstances surrounding the incident which led to his claiming and being awarded compensation.

The questions this panel has addressed in this connection are as follows:

1. What are the Appeals Tribunal's subpoena powers? The Tribunal has not had a previous occasion to address that question explicitly.
2. If the worker appears, whether as a result of the service of a summons or otherwise, and chooses not to testify, can he or she be requested to testify at the request of the employer and then cross-questioned by the employer?
3. If the answers to questions (1) and (2) are yes, what should be the consequences when the worker does not appear or, if present, refuses to testify? What remedies does the Appeals Tribunal have? What remedies ought it to exercise in this instance?

PANEL'S REASONING:

The panel is satisfied that because of the Tribunal's duty under Section 86(m) and Section 80 of the Act to base its decisions "upon the real merits and justice of the case" and to give "full opportunity for a hearing", it has both the power and the obligation to hear any evidence it considers necessary to determine the real merits and justice of a case and to provide a full hearing opportunity.

This includes most particularly the evidence of the worker claiming compensation. The panel has no difficulty, therefore, in concluding that its powers under Section 86(m) and Section 81(a) of the Act includes the power to summon and enforce the attendance of the worker.

The panel is also satisfied that the fact that the Tribunal's duty to decide on the real merits and justice of the case and to give a full opportunity for hearing is coupled with the power to determine its own practice and procedure (Section 86k), means that the Tribunal may require workers or employers to testify and be cross-questioned.

The employer's counsel argues that in this case where important factual issues exist in respect of which the worker's testimony is obviously of critical importance, the employer could not be said to have had a full opportunity for a hearing, and the Tribunal could not be said to be making a decision on the real merits and justice of the case, unless the worker is required to testify and the employer given an opportunity to cross question him. The worker has not testified at any of the previous proceedings in this case.

The panel agrees with those submissions. In the panel's view, this is an appropriate case to exercise the Tribunal's power to require the worker to testify and submit to cross-questioning. Of course the nature of any such cross-questioning and its limits remains a matter for the Hearing Panel's supervision during the course of the proceedings.

As to the remedies available to the Tribunal in the circumstances where a party refuses to attend or testify, the panel notes that under Sections 86m and 81(a) the Tribunal, like the Board, has the power to summon and enforce the attendance of witnesses (this would extend to witnesses who are also parties) and to compel them to give oral or written evidence under oath "in the same manner as a court of record in civil cases". It would appear, therefore, that the Tribunal has the power to issue bench warrants and possibly cite uncooperative witnesses for contempt.

However, where a witness who refuses to appear and testify is the person claiming entitlement to compensation, there will often be no necessity to issue or enforce a summons. In the face of a wilful decision by persons who claim compensation not to make themselves available for questioning, the Tribunal is entitled to draw such inferences as may be justified, in relation to factual issues, from that refusal to attend. Any such adverse inferences could, of course, only safely be made if prior to the hearing the claimant had received clear notice of the Hearing Panel's right to draw such inferences from any failure to attend.

From what occurred at the hearing in this case, it is apparent that the worker is in touch with his representative, is aware of the appeal and these proceedings, and can be reached at the home address which appears on his own written authorization to his representative. If a written communication were sent to that address with a copy to the worker's representative, the panel is satisfied that the worker would receive notice of the communication.

In these circumstances, in advance of the next hearing in this appeal the Tribunal will send by regular mail a written special notice addressed to the worker at the aforementioned address, with a copy to Mr. Pukitis.

In that notice the panel will advise the worker of the necessity of attending the next hearing and warn him that should he choose not to come, the Hearing Panel will feel entitled to assume that he failed to come because of a concern that his testimony would jeopardize his entitlement to the compensation in question. In those circumstances the panel would consider itself free to draw the obvious adverse inferences particularly on the factual issues of drug or alcohol use or abuse prior to the incident. We do not think it necessary that any further effort be made to serve the subpoena. The form of the notice is set out in Appendix "A" to this decision.

Second Preliminary Issue: Perception of Bias where Hearing Panel Receives Written Submission of Tribunal Counsel Prior to the Hearing.

HOW THE ISSUE ARISES:

The second preliminary issue in this appeal arises from the circumstances that prior to the hearing the Tribunal's counsel delivered to each member of the Hearing Panel a written document entitled "Tribunal Counsel Office Submissions". In this document, Mr. Siegel - the Tribunal's counsel in this case - reviewed the applicable law on some of the issues that the panel will have to consider in this case. The employer's counsel took exception to the delivery of that document to the panel in advance of the hearing. He argued that because panel members read the Tribunal Counsel Office's submissions on some of the legal issues beforehand - before the parties had had an opportunity to file responses - a reasonable apprehension of bias was created.

Citing a line of Canadian Judicial authority dealing with the principle that Adjudicators are not entitled to hear cases in circumstances where there exists a reasonable apprehension of bias, counsel for the employer asked that the panel withdraw from the case and that a new panel be appointed.

Mr. Siegel is a lawyer employed full-time by the Tribunal in the Tribunal Counsel Office. He was assigned by the Tribunal's General Counsel who heads up that Office to act as the Tribunal's counsel in this particular appeal. The submissions to which the employer's counsel takes exception consist of a 10 page typewritten document. A copy of it, amended to mask the identity of the appellant employer and the worker, is attached as Appendix B to this decision.

The role of persons in Mr. Siegel's position as Tribunal counsel may be described briefly as follows. They take the WCB file and cull from it what they consider to be the relevant documents. They then prepare a draft "Case Description", setting out the background and undisputed facts and identifying the factual issues and any legal issues. They provide to the parties to the appeal copies of the Case Description and of the documents from the WCB file which they believe should be filed with the Hearing Panel.

The parties to the appeal are invited to advise counsel if there is anything in the Case Description which they think needs to be amended or deleted or if there are any omissions. Any changes that the parties require are then made or disagreements noted. When the Case Description and the list of documents have been settled copies of the Description and documents are then provided to the Hearing Panel.

In the preparation of the Case Description and the selection of relevant documents, etc., Tribunal counsel have no contact with members of the Hearing Panel. They act under general instructions from the Tribunal and where they feel it is necessary to get specific instructions concerning any aspect of a particular case they will appear before a separate panel of the Tribunal called a Case Direction Panel - a tri-partite panel like the Hearing Panel - which will provide them with those instructions. If contentious issues arise during the preparation of a Case Description which cannot be resolved by discussion between the counsel and the parties, the parties may make representations to the Case Direction Panel and the matter may be resolved at that level. Ultimately, any unresolvable issues about the relevancy of any document or the identification or definition of issues etc. will be left to be dealt with by the Hearing Panel at the first hearing.

The Tribunal's instructions to the Tribunal Counsel Office and to the members of the Tribunal concerning contact in any case between the Tribunal's counsel and any member of the Hearing Panel prior to the hearing are explicit. With the exception of the documents delivered to the Hearing Panel in preparation for the hearing - copies of which are also provided to the parties - the Hearing Panel members are to have no prior communication with the Tribunal counsel about any case on which they sit as a member of the Hearing Panel. Any such prior contact disqualifies them from sitting as a member of the Hearing Panel.

The role of the Tribunal Counsel at the actual hearing of the case has been defined in internal Tribunal documents in the following terms:

"At the hearing of a case, a Tribunal Counsel Office member shall act as counsel to the Tribunal. His or her instructions in that role are to assist the Tribunal from a non-adversarial or partisan perspective in the conduct of the hearing and in the clarification and probing of evidence; to present any evidence to be called on the initiative of the Tribunal; to help with the elucidation of the issues and evidence, and to defend the Tribunal's process; all as may be necessary or desirable for an expeditious, fair, and effective hearing."

The employment by the Tribunal of its own counsel both in the pre-hearing preparation of cases and at the hearings themselves, and the utilization of separate case direction panels for instructing and supervising the work of such counsel, reflects the special role and operational circumstances of this Appeals Tribunal. A detailed explanation of the Tribunal's reasons for adopting a process utilizing counsel of its own in the manner described, may be found in the Technical Appendix attached to this decision.

With the foregoing description of the Tribunal counsel's role as context, we now turn to consider the particular activity of counsel in this case and the specifics of the objection taken by counsel for the employer.

Mr. Siegel, was assigned to the case. He culled the file and wrote a draft Case Description. To the Case Description he attached copies of the WCB file memoranda, medical reports, etc., which he considered ought to be submitted to the Hearing Panel as part of the evidence to be considered at the appeal. A copy of this draft Case Description together with the attached documents was sent to representatives of both parties. Counsel for the employer responded in a letter addressed to the Tribunal counsel.

He indicated his wish to have included in the package to be presented to the Hearing Panel a report of another doctor and he indicated that the employer would like to see the issues described in the Case Description modified somewhat. The letter specified the modifications that the employer would be presenting. On receipt of that letter, Mr. Siegel amended the Case Description to reflect the additional information from the employer. The Case Description was finalized and copies of it were sent to the representatives of both parties. The Case Description and the copies of the attached materials were then sent by the Tribunal counsel to members of the Hearing Panel on the eve of the hearing.

Up to that point, the proceedings had been entirely in accordance with the procedures as specified by the Tribunal. And, indeed, counsel for the employer takes no exception to the process involving the drafting of the Case Description, identification of documents to be used etc. The panel would emphasize that in accordance with the internal rules concerning the role of the Tribunal counsel and its relationship to the Hearing Panel, no member of the Hearing Panel had any pre-hearing communication with the Tribunal counsel concerning this case other than to receive the Case Description and attached documents.

The Tribunal counsel then took an additional step outside the routine of the Tribunal's procedures in this respect and it is this extra step which the employer's counsel alleges creates the reasonable apprehension of bias.

One of the important issues that the facts of this case require this panel to address when it comes to determining the merits of the appeal is whether or not the incident could be said to arise out of or in the course of the worker's employment having regard to the fact that it took place on his own time in his own locked room.

Because the worker in this case was a sailor who lived on board the employer's ship where he was employed, the case falls into a classic line of cases involving "residential employees". In these cases, workers' compensation boards and courts have often had to make the distinction between what constitutes an accident arising out of or in the course of employment and what does not, in the complicating circumstance that the worker spends his private personal time as well as his working time on the employer's premises. As might be expected, the court and compensation board decisions in which this difficult issue has been addressed over the years are numerous.

Under these circumstances, Tribunal counsel, acting on his own initiative and pursuant to his general instructions to facilitate the work of the Hearing Panel, proceeded to analyze that line of cases and to provide the Hearing Panel with written submissions describing those cases and suggesting to the Hearing Panel the general principles which to him seemed to emerge from an analysis of the various cases. This is the document attached as Appendix B entitled "Tribunal Counsel Office Submissions".

(The Panel anticipates that Appendix B may be viewed with some apprehension by those members of the Appeals Tribunal's audience who are concerned that the Tribunal not develop a legalistic approach to compensation. The Appendix is full of references to court decisions.

The Tribunal shares the view that a legalistic approach to resolving issues in the cases that come before it is not desirable. Indeed, the Act itself instructs against it. The direction to decide on the "real merits and justice" of a case, and the permission to the Tribunal not to consider itself "bound to follow strict legal precedent" speak clearly to the Legislature's concern that workers' compensation cases not be allowed to turn on legal technicalities. The Tribunal not only accepts those instructions, as, of course, it must, but it does so with the conviction that the policy against the development of a technically complicated workers' compensation law is sound and necessary.

That policy does not, however, warrant this Tribunal in turning a blind eye to the existence of useful decisions of other adjudicative tribunals. Where in a case before the Tribunal an issue of difficulty and importance arises which tribunals and courts in other jurisdictions have had occasion to consider, in this panel's view it would be wrong, and against the interests of both workers and employers, for a Hearing Panel to refuse to look at such decisions. Indeed, its authority to refuse may be doubted given the intrinsic administrative law requirements of a "full hearing"

It is not in any event a question of being bound by the decisions of others but of learning from the decisions of others--of not, in short, re-inventing the wheel.

There will also be instances where decisions of courts clearly superior to the Appeals Tribunal, such as the Supreme Court of Ontario or the Supreme Court of Canada, may be seen to bear directly on an issue before the Tribunal. In those circumstances, while the statutory permission not to be bound by strict legal precedent no doubt gives the Tribunal some additional room in assessing the necessary implications of such decisions, the Tribunal could not, in this panel's view, ignore them. The workers' compensation law which the Appeals Tribunal is administering cannot exist in isolation from the mainstream of Canadian law, even if that were thought by anyone to be desirable.

In this case, the Tribunal is addressing for the first time the very difficult problem of applying the classic phrase "arising out of or in the course of employment" to a residential employee situation. It may be expected given the Employer's definition of issues, that the employer's Counsel will be submitting in argument the decision of courts on the same issue. Mr. Siegel's initiative in assisting the Hearing Panel (and the parties) with a comprehensive summary and analysis of what other adjudicators have done and said in applying identical wording to similar situations is therefore welcomed.)

The nature and purpose of Mr. Siegel's submissions may perhaps best be seen by the opening paragraph of that document which reads as follows:

"These materials are provided to the parties and to the Tribunal Hearing Panel in order to facilitate the characterization of a number of the legal issues which arise in this case. They are not intended to circumscribe in any way the actual presentation of these issues to the panel by the parties or by Tribunal Counsel after the evidence in this case has been presented. Rather, since the function of Tribunal Counsel is to act in a facilitative, non-adversarial role, the pre-hearing analysis of the relevant jurisprudence and the approach which Tribunal Counsel expects to take in argument are herein provided in advance."

It should be noted here that it was always intended that copies of this submission would be provided to the parties as well as to the Hearing Panel. Counsel for the employer has indicated that had the submissions been provided to him in sufficient time for him to provide the Hearing Panel before the hearing with a written response to those submissions, no exception would have been taken.

In fact what happened was that because of the tightness of the scheduling of the hearing relative to the preparation work - a tightness of scheduling which the Tribunal has generally been unable to avoid in these early months of its work as it struggles to get sufficient cases prepared, scheduled and heard - the Tribunal counsel was unable to get copies of the submissions to the representatives of the parties in time to permit them to make a written response prior to the hearing. We understand that copies of the submissions were provided to the representatives the day before the hearing. They were provided to the panel members at the same time and were read by the panel members the evening before the hearing.

We do agree with the employer's counsel that Exhibit "B" is the kind of document that ought to be shared with the parties before the hearing, in time to allow the parties to make written responses which the Hearing Panel might read at the same time as they are reading the Tribunal counsel's submissions. To say that that would be a preferable practice is not to say, however, that the failure to accomplish it in this case is necessarily grounds for a reasonable apprehension of bias.

PANEL'S REASONING:

The employer's counsel relied on certain particular aspects of Appendix B as raising a reasonable apprehension of bias. They are as follows:

1. At page 3 in dealing with the Supreme Court of Canada's 1952 decision in the Noell case and attempting to relate it to the facts in the instant appeal, Tribunal counsel made the following statement:

"As opposed to sleeping in one's cabin whilst aboard ship, Ms. Noell's activity was not a necessary expectation of her hiring. On the other hand, the activity (of the worker in this case) at the time of his accident - sleeping or resting in his cabin - might more easily be seen as a necessary incident of shipboard employment."

2. In the paragraph at the top of page 5 counsel said the following:

"The application of these principles to (this case) would seem to be clear. As a sailor residing of necessity in shipboard accommodations provided by his employer, the worker here falls into the category of cases where residence is mandatory, and would not, merely by virtue of being on his own time while aboard ship, be outside of the course of his employment. Notwithstanding this position taken by Tribunal Counsel, it is submitted that it remains open for the Tribunal to find that other of the worker's actions prior to the accident may have served to remove him from the course of his employment."

3. The two paragraphs at the top of page 6:

"It is submitted, however, that the restrictive reading of the term 'arising out of' to causation through the actual discharge of the worker's duties is unduly narrow in the modern context. The case law discussed Supra contains numerous references to situations which broaden this particular approach (see example the quote from Noell on page 2). It is submitted that the words 'arising out of' should instead be taken to require a causative inter-relationship between the global employment context and the accident itself. Put another way, the test might be: 'But for the employment context, and the presence of the worker therein, would this injury likely have occurred?' The words 'in the course of the employment' by contrast would seem to require that the worker be in some manner engaged in the employment at the time of the accident and to not address the 'but for..' aspect.

As a sailor, it has been submitted that the (worker in this case) was prima facie engaged in the course of his employment at all times while aboard ship. Applying the Section 3(2) presumption, the accident which befell him may be considered, again prima facie, to have arisen out of the employment. Counsel for the employer is expected to submit that the consumption of drugs or alcohol by (the worker in this case) prior to the accident served to rebut these presumptions, removing him from the course of the employment.

While the issue of alcohol or drug abuse (substance abuse) remains to be established through evidence at the hearing, for the purposes of the ensuing analysis, it will be assumed to have been proven."

The employer's counsel does not allege that the panel's receipt of Appendix B prior to the hearing created any actual bias. He is relying on the concept of "legal bias" which is to say that the panel's reading of the above sections of the document created a "reasonable apprehension of bias"--in effect an apprehension that the panel or one or more of its members may have been led to prejudge the issues on which Tribunal counsel made his submissions. Such an apprehension would be sufficient grounds to establish legal bias even though no actual bias exists.

The test of legal bias is set out by the Supreme Court of Canada in the decision commonly cited as the Marshall Crowe case (Committee for Justice and Liberty et al v. National Energy Board et al (1976), (1978) 1 S.C.R. 369). It reads as follows:

"What would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude? Would he think that it is more likely than not that (the adjudicator), whether consciously or unconsciously, would not decide fairly?"

This test was cited with approval by the Federal Court Trial Division, in 1984, in MacBain v. Canadian Human Rights Commission, (1985) 11 D.L.R. (4th) 202. In the MacBain case the Federal Court also quoted a passage from the decision of Mr. Justice De Grandpre in the Marshall Crowe case in which De Grandpre J. made the following interesting distinction in this respect between administrative tribunals and courts.

"The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted by statute with an administrative discretion exercised in the light of its experience and of that of its technical advisors. The basic principle is of course the same, namely, that natural justice be rendered. But its application must take into consideration the special circumstances of the Tribunal. As stated by Reed, Administrative Law and Practice 1971 at page 220:
"...'tribunals' is a basket word embracing many kinds and sorts. It is quickly obvious that a standard appropriate to one may be inappropriate to another. Hence, facts which may constitute bias in one, may not amount to bias in another."

The MacBain decision also cited to the same effect the words of Tucker L.J. in Russell v. Duke of Norfolk, (1949) 1 all E.R. 109 at page 118:

"There are, in my view, no words which are of universal application to every kind of enquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth."

It is clear, then, what the test of legal bias is and it is also clear that the test must be applied with due regard for the particular circumstances of each tribunal in respect of which the question arises.

The panel considers the following circumstances to be of particular significance in considering the merit of the employer's objection.

1. The Workers' Compensation Appeals Tribunal is a specialized Tribunal. It will more often than not be true that a particular Hearing Panel will consist of members, one or more of whom will in previous cases have heard arguments and submissions from representatives of workers or employers or from a Tribunal counsel concerning legal issues which they will be required to address again in the case now before them. Thus, from a practical point of view, if an informed person would conclude that a reasonable apprehension of bias arises from the fact that members of a Hearing Panel have received pre-hearing submissions concerning the meaning of words of the Act, it will very shortly be impossible to put together a panel about which the same complaint could not be made.
2. The submissions in question were in respect of points of law and the application of that law. The Tribunal's counsel does not at any point urge on this panel any particular conclusion as to what its finding of fact should be. He works at all times with the facts set out in the Case Description which are not in dispute or, where he is examining the application of the law to a particular version of disputed facts, he makes it clear that he is assuming a particular conclusion as to the facts for the purpose only of examining the possible legal consequences.
3. The submissions are contained in a document of some 10 pages and the nature of the submissions must be considered in the context provided by that document. The panel is satisfied that, overall, the Tribunal counsel went out of his way to ensure that the points that he thinks important for the Tribunal members to appreciate are not pitched in any assertive or aggressive manner but are simply laid out for the members' inspection in an entirely even-handed fashion. He does make it clear that he has arrived at an opinion of his own as to how the various decisions are to be reconciled and what principles are to be drawn from them and how those principles relate to the facts of the case before the panel, but he is scrupulous in keeping it clear that these are "submissions" and "opinions". They cannot be in any sense characterized as "directions" or "instructions" to the panel.
4. There is no basis for the view that this panel or any other panel of this tri-partite Tribunal is susceptible to being unduly influenced by the views of its own staff on legal issues.
5. Each of the party's representatives has a copy of these submissions and there will be a full opportunity in the hearing to respond.

We are satisfied, given those circumstances, that this is not a situation of the nature of those found in cases in which a reasonable apprehension of bias has been determined to exist. We note particularly the 1983 decision of the Ontario Divisional Court in Re Becker Milk Co. Ltd. and Workman's Compensation Board, 42 O.R.2d 11, in which the Workers' Compensation Board's action in seeking an opinion from the Board's legal services division after Beckers had presented its case and in the absence of counsel for Beckers, was held not to transgress the requirements of fairness and natural justice, where counsel was subsequently given a chance to respond to that opinion. This conduct by a Tribunal that in its potential for affecting a fair hearing went well beyond what is complained of in this case.

For these reasons, we reject the employer's application to have this panel withdraw from the appeal.

We would make one closing observation about the nature of the Tribunal counsel's submissions in Appendix B. We do not think it is consistent with the Tribunal's Counsel Office structure and the way in which the Tribunal is utilizing Tribunal counsel to suggest that it is the Tribunal's Counsel "Office" which is making these submissions. Submissions may in particular circumstances be submissions which ought not to be made or would not be made without the approval of some senior member of the Tribunal Counsel Office but they remain the submissions of the Tribunal counsel appearing on the particular case. There is no provision in the Tribunal's structure for the Tribunal's Counsel Office coming to a corporate view on any matter. It would be appropriate in the future to keep it clear on the face of such documents that these submissions are those of the particular counsel assigned to the case.

DECISION:

1. The employer's objection to the members of this panel continuing to hear and determine this case on the grounds of reasonable apprehension of bias is rejected.
2. The Tribunal counsel is instructed to organize the resumption of the hearing.
3. Once the date for the next hearing is set, Tribunal counsel is to prepare in timely fashion the special notice in the form set out in Appendix A for signature by the Chairman of the panel and mailing to the worker. This shall be done in time to ensure to the worker ample notice of the hearing and of the requirement that he attend.

DATED at Toronto this 27th day of March, 1986.

SIGNED: S.R. Ellis, B. Cook, R. Apsey

WORKERS' COMPENSATION APPEALS TRIBUNAL

INTERIM DECISION NO. 24

APPENDIX "A"

SPECIAL NOTICE

Notice to: (the worker)

As you know, your employer _____ is appealing the decision which awarded you compensation for the injuries suffered while you were in your cabin on the ship during the night of _____.

The next hearing of that appeal will be held on _____, _____, _____, 1986, commencing at 9:30 a.m.

The hearing will be held at 920 Yonge Street, 2nd Floor, Toronto, Ontario.

You are required to attend that hearing and give evidence under oath concerning facts within your knowledge that concern your claim and particularly about how your injury occurred and what caused it.

No formal summons will be served on you. The panel hearing the case has decided on the basis of information before it at the last hearing that when this notice is sent by regular mail to you at the above address and a copy of it is sent to your representative Mr. Pukitis, it can be safely assumed that you will in fact receive notice of it.

Please take special notice that if you should fail to attend the hearing at the place date and time described above, the Tribunal panel hearing this appeal may decide that you are absent because you are concerned that any sworn testimony you might give would prejudice your claim.

In those circumstances, the Hearing Panel would be free to assume that the answers to questions concerning the cause of your injury which you would have been asked had you attended - particularly questions concerning the use or abuse of alcohol or drugs - are answers that are contrary to your interests.

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It is not intended by this special notice to suggest that at this stage prior to the hearing the Hearing Panel has any views one way or another as to the merits of the employer's appeal. It is simply the case that the panel is aware that you knew of the last hearing and elected not to attend because you had not been formally served with a summons. It wants you to know that attendance is not optional. Failure to come to the next hearing may result in the Tribunal drawing, from your failure to attend, conclusions on disputed factual issues that may be contrary to your interest.

Reasonable travelling expenses will be paid by the Tribunal.

DATED at Toronto, Ontario, this 27th day of March, 1986.

SIGNED: S.R. Ellis, B. Cook, R. Apsey

WORKERS' COMPENSATION APPEALS TRIBUNAL

INTERIM DECISION NO. 24

APPENDIX B

Re (Worker) and (Employer)

TRIBUNAL COUNSEL OFFICE SUBMISSIONS

These materials are provided to the parties and to the Tribunal Hearing Panel in order to facilitate the characterization of a number of the legal issues which arise in this case. They are not intended to circumscribe in any way the actual presentation of these issues to the Panel by the parties or by Tribunal Counsel after the evidence in this case has been presented. Rather, since the function of Tribunal Counsel is to act in a facilitative, non-adversarial role, the pre-hearing analysis of the relevant jurisprudence and the approach which Tribunal Counsel expects to take in argument are herein provided in advance.

(As noted in paragraph 15 of the Case Description, by virtue of Part III of the Workers' Compensation Act, certain provisions of that Act, as it existed prior to April 1, 1985, continue to apply to this case. The section numbers referred to herein, therefore, refer to the pre-1985 Act.)

It is anticipated that counsel for the employer will be advancing the following arguments at the hearing. The Workers' Advisor has raised no further issues, and it is expected that he will be arguing against each of the following propositions:

1. Notwithstanding that the accident occurred upon the employer's premises - namely the ship - since it took place on the worker's own time, in his own locked room, it did not arise out of and in the course of his employment.
2. The employer will allege that the worker had consumed drugs and/or alcohol prior to the accident, and by so doing, removed himself from the course of his employment.
3. In the alternative, the employer will argue that the worker's drug or alcohol consumption was the cause of the accident, and that this constituted serious and wilful misconduct on his part so as to disentitle him to the receipt of benefits pursuant to s.3(1)(b) of the Act.
4. In his letter of January 8, 1986, counsel for the employer raised a number of factual and procedural matters in addition to those referred to above. It is thought by Tribunal Counsel that these points would be best dealt with orally at the hearing. The fact that they are not addressed further herein in not intended to denigrate their importance in any way.

ACCIDENT ON EMPLOYER'S PREMISES:

This case falls into a class of cases which involve "residential employees" that is, employees who live upon premises provided to them by their employer. The leading judicial authority on this subject in the Canadian jurisprudence is that of the Supreme Court of Canada in WCB v. CPR & Noell, (1952) 2 S.C.R. 350. That case involved a waitress at a resort hotel, who was in receipt of meals and accommodation on the employer's premises as part of her remuneration. While she was required to reside upon those premises, she was entitled to come and go as she chose during her off-duty time. During some of this free time, with the consent of her employer, she made use of the resort's swimming facility and was gravely injured when she dove into water which was too shallow. In giving his judgement, Rand J noted that the purpose of the legislation was to protect employees from risks which "by reason of their employment, in the sense of their job, they were exposed."

"It is when he is on the employer's premises, however, and is not at the moment actually furthering the employers' work or interest that difficult questions may arise. The true interpretation of the statutory language seems to be indicated by the illustration of simple cases... A domestic servant who, by her engagement, lives as a member of the household, is conceived to be on duty at all times while on the premises notwithstanding that she is not actually doing work, but, just as clearly, she is not so when she is in town shopping for herself." (at 369)

In this case, the court rejected the domestic servant analogy on the basis that the worker here had specific free hours, during which she was free to come and go and do as she wished. Notwithstanding that she was obliged to live at the hotel, she had no continuing duty to act or remain "on call". Since she was not in the course of work, nor of entering or departing from it, to be within the statute, the Court held that the accident must be found to be "an incident of work". The Court had difficulty accepting that a privilege such as swimming, or golfing, or using a railway pass, would be such an incident of work.

His Lordship continued:

"... to bring the act within the statute, the employee must be where she is either in carrying out a duty or under the coercion of the contract or in an exercise of conduct that is intimately involved, as an incident..." (p. 370 - 371).

The Court made reference to the decision of the English Court of Appeal in Philbin v. Hayes (1918), 87 L.J.K.B. 779 a case wherein a worker had been permitted by his employer to sleep on the work site in a hut at a cost to the worker of 2d per day. This was not a compulsory requirement of the employment and in fact, only about half of the workers so employed made use of these huts. The hut in which the worker was sleeping was wrecked by a storm, and he was injured while lying in bed. Compensation was denied.

The 3 cases cited on p. 371 of the Noell decision, of which Philbin was one, have as a common thread a sufferance of activities by the employer. Of these acts, namely sleeping in a hut, taking a bath, and collecting firewood, none were necessary incidents of the employment. It would seem that the Noell case falls into a similar category - the claimant was on a frolic of her own, albeit with the company's approval. As opposed to sleeping in one's cabin whilst aboard ship, Miss Noell's activity was not a necessary expectation of her hiring. On the other hand, the activity of the worker in this case at the time of his accident - sleeping or resting in his cabin, might more easily be seen as a necessary incident of shipboard employment. This view may find support in a passage from a decision of the House of Lords, in the case of Davidson & Co. v. Officer, (1918) A.C. 304 at 327 where Lord Atkinson stated:

"The words 'in the course of his employment' mean, I think, while the workman is doing something he is employed to do. In the case of a sailor who lives on board his ship or an indoor servant who lives in his master's house, these words would of course cover and include things necessarily incidental to his service there - such as taking his meals, sleeping, resting &c. In satisfying these demands of nature the sailor is as truly doing something within the course of his employment as he would be in keeping a look-out or going aloft."

This example from Davidson was distinguished in Philbin on the basis that residence was not a necessary aspect of the employment in the latter case.

The residential employee problem has been canvassed in a number of other jurisdictions as well. In Decision No. 39: Re The Coverage of Workmen's Compensation (1974), 1 Workers' Compensation Reporter 158, The British Columbia WCB considered the matter of a worker who was injured in a fall while descending some steps from a bunkhouse. It was not decided whether residence therein was a term of the contract of employment, but it was the only accommodation available. The accident occurred during off hours while the worker was going out for a recreational walk. The Board held that "Compensation coverage extends to injuries arising out of and in the course of work, the course of receiving the consideration for which the employee is working, and the course of other aspects or features of the employment relationship. In the case of a residential employee, this must include injuries arising out of and in the course of using the premises provided by the employer." It was reasoned that the employer had selected the accommodation and all of the features relevant to its safety. Further, by virtue of the nature of the employment location itself, the worker's freedom to control many aspects of his personal life was necessarily limited.

"This does not, of course, mean that every accident occurring on the premises of the employer will necessarily be compensable. Thus, although bunkhouse claims are generally paid, they are not paid if the injury results from the introduction to the premises of an exceptional hazard by the worker himself, for example, where the man accidentally shoots himself with his own shotgun." (at 160).

Rather than distinguishing Noell on the basis of privilege extended as suggested supra, the B.C. board treated it as something akin to the above example of the shotgun. The diving accident resulted from an exceptional hazard - a special risk, voluntarily assumed by the worker, which was entirely outside the ambit of the employment.

The notion of drawing a line of demarcation between those residential cases where the residency is an explicit or implicit requirement of the employment contract and those where it is an option of which the worker may avail himself at his choosing is present in the American jurisprudence as well. In Totton v. Long Lake Lumber, (1939), 97 P.2d 596, the Idaho Supreme Court dealt with the case of a lumberman who had been residing in a lumber camp bunkhouse provided by the employer for the convenience of the workers for a charge of \$1.30 per day, there being no other suitable accommodation within a radius of twenty to twenty-five miles. The worker, while asleep in an upper bunk, fell out of bed and was injured. The court found the general rule to be "that when the contract of employment contemplates that the employee shall sleep upon the premises of the employer, the employee under such circumstances is considered to be performing services growing out of and incidental to such employment during the time he is on the premises of the employer." It was therefore held that the injuries sustained by the worker in falling out of the bunk arose out of and in the course of his employment. To like effect is the Connecticut decision in Carroll v. Westport Sanitarium, (1944), 39 A.2d 892.

The application of these principles to the matter of the worker in this case would seem to be clear. As a sailor residing of necessity in shipboard accommodations provided by his employer, this worker falls into the category of cases where residence is mandatory, and would not, merely by virtue of being on his own time while aboard ship, be outside of the course of his employment. Notwithstanding this position taken by Tribunal Counsel, it is submitted that it remains open for the Tribunal to find that other of the worker's actions prior to the accident may have served to remove him from the course of his employment.

ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT:

In his judgement in Noell, Rand J. discussed the difficulty of the construction of the phrase "arising out of and in the course of the employment" and, referring to a quote from Viscount Haldane, left open the inference that this statutory language was inadequate for the legislative intent. Notwithstanding the difficulty which this phrase has created, the Tribunal must interpret it. In attempting to arrive at a true construction of the words, it is essential to look not only at Subsection 3(1) of the Act, where the phrase itself occurs, but also at Subsection 3(2), which provides a statutory presumption for its application. Subsection 3(2) reads as follows:

Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment and, where the accident occurred in the course of the employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.

The effect of this provision is to make the phrase "arising out of and in the course of the employment" presumptively disjunctive, even though on its face, it would appear to be conjunctive. This is in contrast to the situation in Noell and in the English cases, where no corresponding provision is referred to. In the absence of contrary evidence adequate to rebut the presumption, then, it is sufficient to establish this aspect of his claim for the worker to show either that the accident arose out of the employment OR that it occurred in the course of the employment.

It is necessary for the Tribunal to consider, then, what each of these two elements of Section 3(1) in fact, mean. In Kilgren v. Browning, (1929) 2 D.L.R. 286 at 288 (Sask. C.A.), Martin J.A. stated that "(t)he words 'arising out of' in the Act, suggest that the employment or the discharge of his duties by the workman must be the cause of the accident, and the words 'in the course of the employment' mean, that the workman, in order to recover must be engaged at the time of the accident in the discharge of the duties he owes the employer under his contract of service."

It is submitted, however, that the restrictive reading of the term "arising out of" to causation through the actual discharge of the worker's duties is unduly narrow in the modern context. The case law discussed supra contains numerous references to situations which broaden this particular approach (see e.g. the quote from Noell on p.2). It is submitted that the words "arising out of" should instead be taken to require a causative interrelationship between the global employment context and the accident itself. Put another way, the test might be: "But for the employment context, and the presence of the worker therein, would this injury likely have occurred?" The words "in the course of the employment" by contrast would seem to require that the worker be in some manner engaged in the employment at the time of the accident and do not address the "but for.." aspect.

As a sailor, it has been submitted that the worker here was prima facie engaged in the course of his employment at all times while aboard ship. Applying the Section 3(2) presumption, the accident which befell him may be considered, again prima facie, to have arisen out of the employment. Counsel for the employer is expected to submit that the consumption of drugs or alcohol by the worker prior to the accident served to rebut these presumptions, removing him from the course of the employment. While the issue of alcohol or drug abuse (substance abuse) remains to be established through evidence at the hearing, for the purposes of the ensuing analysis, it will be assumed to have been proven.

Such substance abuse may be considered through at least two approaches:

1. Alcohol or drug abuse, being contrary to the rules imposed pursuant to the contract of employment, constitutes misconduct of such an extreme nature as to remove the worker from the course of his employment.
2. The alcohol or drug abuse was the sole cause of the accident, and the relationship of the employment context thereto was irrelevant or merely incidental. The accident would not therefore have arisen out of the employment, and the Section 3(2) presumption would be rebutted.

The notion that the actions of a worker while otherwise in the course of his employment may serve to remove him from the course of his employment may be traced back at least as far as the decision of the House of Lords in Lancashire and Yorkshire Railway Company v. Highley, (1917) A.C. 352 (H.L.). The worker in that case, a railway employee, had been waiting for a train in the course of his duties. While waiting, he, and his co-workers took a shortcut across some tracks to obtain some hot water to make breakfast. On return, the worker passed under a train, which moved and killed him. A safe alternative route existed. In judgement, Viscount Haldane discussed the phrase "injury by accident arising out of and in the course of his employment":

"The injury by accident must have occurred as something which would not have occurred but for the circumstance of the employment and as having been something due to it, the employment and it must further have occurred during its currency."

In addressing the first condition, Viscount Haldane considered the notion of "added peril", which he took to mean "a peril voluntarily superinduced on what arose out of the employment, to which the workman was neither required nor had authority to expose himself." In this case there had been no duty on the worker to be where he was in order to get food or for any other purpose. This was in contrast to a decision in a nearly identical fact situation in Gane v. Norton Hill Colliery Ltd, (1909) 2 K.B., where the claim had been allowed. The Court in Highley distinguished Gane on the basis that the court there had found the actions in question there to have been authorized by the Company. In Highley there was no such finding. Rather, the actions of the deceased were found to have involved an infraction of company rules.

The decision would seem to turn on the distinction from Gane, that this case was a matter of "added peril" assumed by the worker voluntarily and contrary to good sense, and therefore to the implied rules for the conduct of the employment. As Viscount Haldane put it in his judgement in Highley, this is quite distinct from doing something within the sphere of his employment merely in a wrong way. Rather, this "added peril" is "a peril voluntarily superinduced on what arose out of the employment, to which the workman was neither required nor had authority to expose himself." In Highley, there was no duty and no sensible need for the worker to be where he was in order to get food or for any other purpose. This voluntary assumption of an "added peril", then, was something which in no way could reasonably be expected to arise out of the employment, but was something completely extraneous thereto, and in fact was something which was specifically prohibited to the worker.

Reading this in the modern Ontario context, an alternative approach might suggest that their Lordships were anticipating and applying the disqualification from entitlement that arises in Section 3(1)(b) - Compensation is not awarded where the injury is attributable solely to the serious and wilful misconduct of the worker. The final phrase of that subsection, however, creates an exception to the disqualification where the injury results in death or serious disablement. That exception would have been applicable in the circumstances of the Highley case. It remains open for the Tribunal to determine whether the injury to the worker in this case (a 30% permanent disability) resulted in such a serious disablement.

The Saskatchewan Court of Appeal, in Wright v. Canadian Pacific R. Co. (1922), 1 D.L.R. (N.S.) 371 (Sask. C.A.) addressed itself to the question: "Where an act is forbidden, either by statute or rule, is the forbidden act to be considered merely as an act of disobedience, or as an act outside the scope of the employment?" In that case the worker had been injured as a direct result of his knowing breach of one of the company's safety rules, namely entering between moving cars and pushing the drawbar with his foot in order to facilitate coupling. It was held that the cause of the accident was not within the sphere of the employment. Following Highley, "the plaintiff was running a risk which was not one of the ordinary risks of his employment, and was also in a place (between moving cars) where he was expressly forbidden to be, for the purpose of doing an act, that is, shoving over the drawbar with his foot, which he was expressly forbidden to do." The accident was therefore not compensable.

This decision must, of course, be read in light of Section 3(1)(b). It seems that it should be considered then whether misconduct can be considered in 2 different contexts rather than just that of Section 3(1)(b) - i.e. Do we first look at "arising out of and in the course of the employment" and then consider if misconduct was such as to take the worker outside of the course of the employment entirely (see Rudland v. Smith *infra*) and then secondly consider the Section 3(1)(b) issue as a distinct disqualifying factor?

A strong argument as to why misconduct, to any degree, should not operate to remove a worker from the course of his employment within the meaning of the Act is contained in British Columbia Decision No. 108 Re The Violation of Safety Regulations by the Worker (1975), 2 Workers' Compensation Reporter 44. The Board noted that the basic principles of Workers' Compensation law dictate that fault is not to be a relevant consideration in the awarding of compensation. The sole exception to that in the Act is the provision of s.3(1)(b), which serves to exclude compensation where the sole cause of the accident was the worker's "serious and wilful misconduct" and the injury did not result in death or serious disablement. Given that the legislature has addressed the matter of misconduct in the statute in such a way, it is inappropriate that such misconduct should also bear the potential to serve to remove a worker from "the course of the employment".

If these strong words are to be followed, then the question of "arising out of and in the course of the employment" must be considered on a basis strictly preliminary to the consideration of misconduct. This approach as well, has its shortcomings. For example, current Board policy denies entitlement for self-inflicted wounds since "it cannot be considered that such disability arose out of or occurred in the course of employment" (Claims Adjudication Branch Procedures Manual, Document 33/32/10 at p. 2). The issue of whether death or serious disablement results is therefore irrelevant. If, however, the misconduct (for such the self-inflicted wound must be) can only be considered subsequent to "arising out of and in the course of the employment" it must follow that where a self-inflicted wound results in death or serious disablement, the injury is nonetheless compensable.

It is suggested then, that although in most normal circumstances the latter approach to misconduct is to be preferred, there must remain a "window of disqualification" strictly limited only to the most extreme deviations, which could still serve to take a worker entirely outside the scope of his employment. That such a category of conduct must exist was recognized by the B.C. W.C.B in Decision No. 39 Re The Coverage of Workmen's Compensation (*supra*).

At p. 160, the Board noted, in discussing residential employees, that there remained some claims which would not be "paid if the injury results from the introduction to the premises of an exceptional hazard by the worker himself, for example, where the man accidentally shoots himself with his own shotgun." Similarly, in Rudland v. Smith (1917), 33 D.L.R. 536 (N.S.S.C.) Chisholm J. stated the general rule that a worker who exposes himself to added peril through disobedience/misconduct removes himself from the protection of the act and any injury which he incurs does not arise out of the employment within the meaning of the Act.

Such an approach, of voluntary introduction of special risk seems distinct from misconduct per se. If such circumstances (which would include the worker's, if substance abuse is proven) are considered to be a conceptually different category from mere misconduct, it may be doctrinally consistent to treat accidents caused predominantly by such a special risk as taking the worker out of the course of the employment.

This would also be consistent with Professor Ison's treatment of drunkenness in his text on Workers' Compensation in Canada (Butterworth's, 1983). At paragraph 106, he states that where there is no employment causation of the injury (it being caused purely by drunkenness), and the nexus between the employment and the injury is merely one of contemporaneity (e.g. where the intoxicated worker passes out on a normal surface, and injures himself as he falls to the ground) the Section 3(2) presumption may be seen to be rebutted. Where the employment context, however, bears a causative relationship to the injury which is not merely incidental, then the injury may be seen as arising out of the employment and should hence remain compensable. The B.C. WCB, chaired at that time by Professor Ison, discussed this notion in Decision No. 124 Re Intoxication and Claims (1975), 2 Workers' Compensation Reporter 118. The Board offered two examples from its earlier decisions of cases which fell into the latter category of retaining compensability. These were "where an intoxicated seaman fell into the water while attempting to board his vessel (Decision No. 10 (1973) 1 W.C.R. 45), and where a forest industry worker was run over by a logging truck (Decision No. 49 (1974) 1 W.C.R. 210).

Returning to the Supreme Court of Canada's judgement in Noell (Supra), a similar view may be taken, that Miss Noell had voluntarily assumed a special risk, completely foreign to the employment, and hence removed herself from its course. Such an approach follows directly as well, from the statement of Viscount Haldane in Highley, referred to supra, in distinguishing the case before him from Gane (supra) on the basis of "added peril".

Notwithstanding then, that in some cases, the employment will continue to play a merely incidental role in the death or injury, under such a doctrine of "added peril", where the overwhelmingly predominant cause of the accident is the voluntary introduction into the employment context by the worker of an extraneous element of extreme and obvious risk, the disaster that results is not logically something that arises "in the course of the employment". Where this risk factor, however, serves only as a contributing factor, albeit a significant one, and the employment situation plays a non-trivial role in the precipitation of the accident, the reverse would be true, and the accident would continue to be compensable.

If the Tribunal should adopt such an approach, and apply it to this case (continuing to assume for the moment that substance abuse has been established), it would remain for the Tribunal to determine, first, whether such abuse constituted such an extreme and obvious risk as to be capable of negativing the worker's prima facie engagement in the course of his employment at all times while aboard ship, and second, whether the substance abuse was the overwhelmingly predominant cause of the accident, or only a contributing factor.

WORKERS' COMPENSATION APPEALS TRIBUNAL

INTERIM DECISION NO. 24

TECHNICAL APPENDIX

Explanation of the Tribunal's Adjudication Process

The assumption at the root of the Tribunal's process design is that the "appeal" function contemplated for the Appeals Tribunal by the revised Workers' Compensation Act is not an "appeal" in the traditional sense of the term but is, rather, a process of rehearing. It is a process in which, in reviewing the issues relevant to an appeal, the Tribunal is mandated to consider again the same evidence considered at the final WCB appeal level and to hear new evidence, including, in appropriate cases, evidence obtained by the Appeals Tribunal on its own initiative.

This perception of the Appeals Tribunal's role is derived in the first place from the historical tradition in Ontario where each level of the "appeal" processes in workers' compensation matters since the introduction of the Workmen's Compensation system in 1915 has typically been, in whole or in part, a rehearing process. The WCB Appeal Board, which the Appeals Tribunal replaces and whose powers it has largely inherited, dealt with appeals by rehearing cases, with appellants and sometimes respondents typically testifying and/or calling other witnesses, and the Board initiating its own investigations, particularly with respect to medical issues.

The intention of the legislature in this respect may be seen from the fact that the Act's instructions to the Appeals Tribunal concerning the basis of its decisions are identical to the instructions to the Workers' Compensation Board concerning the basis of its decisions. In each case the decisions are to be made "upon the real merits and justice of the case". See Section 86m which makes Section 80 applicable to the Tribunal as well as to the Workers' Compensation Board.

That the Tribunal's role is to rehear cases in the above sense may also be seen from the fact that as part of its adjudicative role the Tribunal has been given explicit investigative and issue-agenda setting functions not usually found in standard adversarial systems of adjudication.

In the revised Act, the investigative function for the Appeals Tribunal is clearest with respect to the medical evidence. Section 86h provides for the appointment by the Lieutenant-Governor-in-Counsel of a roster of medical practitioners. From that roster of practitioners the Appeals Tribunal "may obtain the assistance of one or more of them in such a way and at such time or times as it thinks fit, so as to better enable it to determine any matter of fact in question in any application, appeal, or proceeding."

In addition to that general mandate, the Act gives the Tribunal the power to authorize the Chairman or a Vice-Chairman to enquire into appeals to decide whether or not the worker involved should submit to a further examination by one or more of the medical practitioners on the appointed roster.

That the investigative function of the Tribunal is intended to extend beyond the medical question is demonstrated, in part, by the fact that the Appeals Tribunal has been given many of the same general investigative powers as the WCB itself. These include the power to enter into any premises where work is being done by a worker to inspect and view any work material, machinery, appliance, or article found there and to interrogate any person.

The Tribunal's instructions to base its decisions upon the real merits and justice of the case also anticipate an investigative and issue-setting function as a necessary adjunct to the Tribunal's hearing and adjudication role.

The need for the Tribunal to have an investigative and issue-setting function as part of its adjudication role also arises implicitly from two of its particular operating circumstances. One of these operating circumstances is the fact that the Tribunal's cases inevitably involve, in one way or another, claims against a "public" fund. The other circumstance is that there are routinely no persons responding to the applications or appeals the Tribunal is called upon to decide.

The unique circumstance of the routine absence in Tribunal proceedings of any respondent to an appellants or applicant's case, arises because, (1) in the majority of injured workers' appeals the employer does not appear (This is either because he elects not to, or because he has disappeared--gone out of business, become bankrupt, etc.); (2) in all employer assessment appeals there appear to be no natural respondents, and (3) the WCB does not appear in any case to defend its own decisions. The routine absence of respondents is a circumstance which undermines for the Tribunal a number of important assumptions about traditional adjudication processes.

To say that the decisions of the Appeals Tribunal's involve claims against a public fund is not, of course, strictly accurate. The Accident Fund is not a public fund in the ordinary sense of the word since only employers contribute to it. It is public, however, in the sense that it is made up of financial contributions imposed by law on a large number of unrelated organizations or individuals. The interest of those various organizations and individuals are at stake in every case heard by the Tribunal, since, ultimately, the volume of claims against the fund determines the amount of contribution for which they will each be assessed. Furthermore, as Professor Weiler has noted in the report which proceeded the creation of this Appeals Tribunal, excessive claims against the accident fund are also contrary to the interest of workers generally and of the public at large. From a long term perspective, profits diverted from an employer's enterprise to pay unnecessary or excessive compensation assessments either reduce the amount available for wages and benefits or increase the costs of goods and services.

The fact that the interests of employers, of workers in general, and of the public, in ensuring that the accident fund is not unfairly or unnecessarily charged are routinely not represented by any person appearing before the Tribunal, imposes special responsibilities on the Tribunal. And, even in cases where both the worker and employer are represented there is no guarantee that the interests of the fund will be represented. Very often for example, the employer will be only interested in asserting the right to have the cost of the compensation award transferred in whole or part to the Second Injury Enhancement Fund - a means of sharing the cost implications of the award amongst all members of the fund.

The implications for the Tribunal of the constant presence in the cases which it hears of unrepresented interests may be seen from the following simple illustration.

Consider the common case of a compensation claim that has been refused because the WCB did not believe the injury occurred at work. The worker appeals to the Tribunal and the employer chooses not to contest the appeal. It is not, we think, possible to argue that because the worker's assertions are uncontested, the Tribunal must merely accept them. In analyzing the Tribunal's role and determining the appropriate process we have had to recognize that before allowing such an appeal the Tribunal would have an obligation to the public - to the Accident Fund - to satisfy itself that the claim was in fact well founded. That obligation would require the Tribunal to be active in the determination of the issue agenda and in considering and pursuing the need for further investigations.

In the example cited, and potentially in most cases to some degree, the responsibility arising from the presence of unrepresented interests, requires for the Tribunal not only an investigative and issue-setting role during the preparation for the hearing, but also an interventionist role in the conduct of the hearing.

It could be argued that the Workers' Compensation Board ought to appear by counsel and itself defend its decision in each case. If the Board were to appear before the Tribunal to put the case for the "public" interest, the Tribunal could revert to the classic, aloof role of the traditional adjudicator.

The WCB, however, has taken the view that it does not intend to be involved in the defense of its own decisions at the Appeals Tribunal. Their are current indications that in special circumstances where the Tribunal is addressing seminal policy or jurisdictional issues the Board may decide to appear in support of particular policies. The Board has also indicated a willingness to provide Tribunal hearings with any information or background that a panel may need in addressing any policy questions in any case. But in the majority of cases, particularly in those in which the appeal will turn on individual factual or medical issues, the WCB does not intend to appear in defense of its decisions. And the Tribunal shares the WCB's view that it would be inappropriate for the Board to appear before the Appeals Tribunal in defense of its own decisions on individual factual or medical issues. Such an appearance would be comparable to a judge appearing before an appeal court to defend his or her own trial decisions.

The Tribunal's investigative and issue-setting functions are also implicitly mandated by the non-adversarial, bureaucratic tradition in the determination of rights in Workers' Compensation matters. In 1915, the subject of compensation for industrial injuries was removed from the adversarial system and from the jurisdiction of the courts and became, in effect, a no-fault insurance scheme. The relationship of the worker to the WCB process became one of insured to insurer rather than the adversarial relationship of plaintiff to court. At the Workers' Compensation Board, workers are not expected to define their rights or prove their cases. The workers bring the injury to the Board's attention and the Board identifies and defines the right to compensation and does the investigation necessary to answer the questions which the Board identifies as relevant. Under the Workers' Compensation system rights are not supposed to be dependent on a worker or employer's own advocacy skills or on access to skilled representatives.

The representation of workers and employers in the Board's processes by representatives or advisers has, of course, in fact emerged - as a matter of common practice - as a means of facilitating the progress of the case through the Board's procedures and increasing the confidence of workers and employers that the Board is in fact hearing and understanding their position. It remains, however, a fundamental feature of the system that representation is not necessary - that the worker's and employer's rights are not being determined in an adversarial process. If that be true of the Workers' Compensation Board's process it must also be true of the Appeals Tribunal's process. The Tribunal is designed to be a component of the same system and must be committed, in this panel's view, to the same theory of adjudication. Thus if a worker presents an appeal on an obviously incomplete case, in our opinion the Appeals Tribunal cannot be in the position of saying, "too bad, if only you had known more about it". The Tribunal must have the power to intervene and deal with the case - as the Act instructs - on its true merits.

In short, the investigative and issue-setting functions of the Appeals Tribunal are an adjunct to its hearing and adjudication role which are explicitly and implicitly mandated by its Act.

In designing a process to accommodate these investigative and issue-setting functions, the Tribunal has been very concerned to ensure that those functions are kept separate from its decision-making role. A decision-making body which has an investigative and issue-setting role is in danger during its investigative or issue-setting activity of developing a bias - a fixed disposition concerning the nature of the case and the desirable outcome. In assessing evidence presented at a hearing or in considering arguments of partisan counsel, it may be unable to effectively shake that bias. Sensitivity of our courts to this particular danger may be seen in the practice that has arisen with respect to pre-trial procedures wherein judges engaged in a pre-trial consideration of cases are precluded from participating in the adjudication of the case.

The employment of Tribunal counsel and the utilization of special case direction panels are designed to allow the Tribunal's investigative, issue-setting functions to be pursued while ensuring the necessary degree of objectivity and detachment on the part of the actual decision-makers.

The Tribunal counsel concept also provides the Tribunal with an appropriate mechanism for culling the WCB files and excluding from the hearing process any documents or materials that are irrelevant or unfairly prejudicial. The Tribunal is committed, as one might expect, to the adjudicative principle that in respect of any issue relevant to his or her concerns, a party to an adjudicative hearing must receive an appropriate opportunity to clarify, test or challenge any information or evidence which the adjudicators receive. Accordingly, interests of efficiency as well of fairness require that Hearing Panels not receive any unnecessary or irrelevant material or information.

The WCB file is a chronological collection of paper generated in the course of a worker's association with the Board. Files a foot thick are not uncommon. The Tribunal's counsel is able to comb through those files and, with the assistance of the parties and their representatives and under the general supervision of case direction panels, to identify that part of the information or material which is, in fact, relevant, and to prevent the Hearing Panel from seeing any irrelevant or unfairly prejudicial material.

Finally, the existence of Tribunal counsel and of case direction panels provides a structure for an appropriate pre-hearing process in which in advance of the hearing the issues can be defined, the areas of agreement as to facts and law settled and the outline and dimensions of the evidence to be called, identified. That is a process which is essential not only to the efficiency of any adjudicative tribunal's operation and of any hearing but also in the long run to the quality of an adjudicative tribunal's decisions. In the circumstances of this Tribunal where there is typically only one party to a proceeding, if there were no one playing the role of Tribunal counsel it is difficult to envisage how that pre-hearing preparation process could be accomplished by this Tribunal without raising concerns of apprehended bias in the Tribunal's decision-making process.

DATED at Toronto this 27th day of March, 1986.

SIGNED: S.R. Ellis, B. Cook, R. Apsey.

CASAN
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Workers' Compensation Appeals Tribunal

DECISION NO. 25

Tribunal d'appel des accidents du travail

Panel Chairman: R.E. Hartman

Member: D. Jago

Member: N. McCombie



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #25

THE APPEAL PROCEDURE:

This is an appeal by the worker of a decision of T.D. Allamby, Appeals Adjudicator, dated May 17th, 1985 denying entitlement pursuant to Section 3(1) of the Workers' Compensation Act.

The appeal was heard on January 21st, 1986 by a panel of the Appeals Tribunal consisting of R.E. Hartman, Panel Chairman, D. Jago, a member of the Tribunal representative of employers, and N. McCombie, a member of the Tribunal representative of workers.

The worker attended the hearing and was represented by officials of his union, Messrs. Fitzpatrick and Hersh. The employer was represented at the hearing by its Safety Manager, Mr. N. Brett. Ms. P. Auron, a member of the Tribunal Counsel Office, appeared as Tribunal counsel.

The Panel heard and considered evidence given under oath at the hearing by the worker in oral testimony, and read the relevant forms, memoranda, reports, and medical reports extracted from the WCB file and collected in the Case Description materials. These materials were entered as Exhibit I at the hearing. Both parties had an opportunity to review the materials prior to the hearing and both parties agreed at the hearing the medical evidence was not in dispute. The only issue for the Panel was whether entitlement under the Act had been established.

At the hearing, the Panel also heard oral testimony from the spouse of the worker. General submissions were made at the hearing by the worker's representatives, employer's representative, and Tribunal counsel.

THE ISSUE AND HOW IT ARISES:

The issue before the Panel was whether or not a compensable accident occurred on June 11th, 1984 as alleged by the worker.

The worker is employed as a patrol inspector of appliances manufactured by the employer. At the time of the alleged accident, the worker had been employed with the employer for over 30 years and was 58 years of age.

The worker stated that on June 11, 1984, he was inspecting appliance lids, and placing rejected lids in a box which was approximately 2 x 2 1/2 feet in size. The box containing the lids weighed approximately 85-100 pounds. The worker stated that he bent over to lift the box from the floor to the forklift, a distance of about 8 inches, and that because of a former knee injury, he lifted the box with his back rather than with his legs. As he did so, he felt a sharp pull going down both legs. He dropped the box and a co-worker, who saw he was having difficulty came over to assist; together, they lifted the box from the floor to the forklift. The worker then went to the area where the rejected lids are charged back to the originating department. He slid the box off the forklift to the floor without assistance.

It was the worker's recollection that he mentioned the lifting incident, in passing, to his foreman and general foreman who were standing in the area where the lids were charged. The foremen did not recall this when interviewed by the WCB investigator. In any event, the worker did not report an accident, as such, on June 11th, 1984. The co-worker, when asked 3 months later, did not recall the particular incident on June 11th, 1984 but said he would often assist the worker in such a manner.

The worker continued his regular duties from June 11th to 21st, 1984 taking it a little easier, in his words, and requesting assistance whenever bending or lifting was required. On June 13th, 1984 the worker attended at the company's first aid office to obtain some Tylenol. He testified that he had been taking this regularly on a twice daily basis for pain from an earlier knee injury and on June 13th, 1984 his wife had forgotten to include it in his lunch box.

The worker stated that the Tylenol medication was affording less and less relief and on Tuesday, June 19th, 1984 he telephoned his family doctor. An appointment was made for June 22nd and he booked that day as a vacation day.

When examined by his family doctor on June 22nd, the worker learned that the pain he had been feeling was not related to his earlier knee injury. The doctor, Dr. Pilo, diagnosed lumbar strain and asked the worker if he had lifted anything heavy. The worker at this point recalled the June 11th incident and this is cited in the doctor's medical report of June 22nd, 1984.

On June 25th, the worker's spouse telephoned the employer to advise the worker would not be in. Subsequently, the employer's nurse telephoned the worker at home on June 26th, and the worker telephoned a second nurse of the employer on June 29th, to discuss the layoff.

On July 5th, 1984 the employer forwarded its report to the WCB, apparently viewing the disability as related to prior compensable back claims. The employer disputed entitlement citing the delay in reporting.

The Panel was advised that the worker did not wish it to consider entitlement as an aggravation of prior back claims; the worker testified that his earlier claims were resolved and his back was symptom-free at the time of the accident.

The Panel notes that both the employer and worker representatives accepted the medical evidence contained in the Case Description materials. There was no dispute that the worker sustained a myofascial strain to the lumbar spine which disabled him from heavy lifting and repeated bending. The diagnosis of Dr. Pilo was confirmed in September and October 1984 by two orthopaedic specialists, one retained by the employer and the other by the worker.

THE PANEL'S REASONING:

For the Panel to determine whether the evidence before it supports entitlement it is necessary to carefully weigh and assess the evidence of the worker, the documentary evidence from the WCB file contained in the Case Description materials and any other relevant evidence put forward. In many cases, the only account of the alleged accident comes from the worker whose interest in the outcome cannot be overlooked. The employer has a similar interest and together with the hearsay nature of the documents in the WCB file, there are inherent difficulties in the reliability of the information before the Panel.

In its decision-making process, the WCB has relied on a kind of fourfold test, in practice, in determining whether or not an accident compensable under the Act has occurred. The test is based on the immediacy of four external indicators: (a) onset of symptoms; (b) report to employer; (c) medical attention; and (d) layoff from work. If all four happened immediately after the alleged accident, entitlement would often follow.

While the above approach is a valid starting point, the Panel feels it must examine closely all the circumstances of the case to determine entitlement. What may not be a reasonable explanation in one set of circumstances might be persuasive in another. In one case, the failure to seek medical attention might cast doubt on a claim whereas in another it might be much less significant.

The Panel has reviewed all the evidence entered as Exhibit I together with the additional evidence and representations received at the hearing. The evidence satisfies the Panel that the worker sustained an injury arising out of and in the course of his employment on June 11th, 1984.

With respect to the issue of the worker's credibility, the Panel has reviewed the transcript of the hearing before the Appeals Adjudicator and notes the Adjudicator's opinion, in his decision, that he did not find the worker to be a credible witness. It is, however, the opinion of the Panel that the worker was sincere in his testimony and any inconsistencies were as a result of his honest confusion at times and not an attempt to mislead the Panel. The resulting inconsistencies are minor when viewed in the context of the entirety of the evidence before the Panel, rather than in isolation. The Panel accepts the following:

1. There was an incident on June 11th, 1984 involving the worker lifting an 85 to 100 pound box of washing machine lids, from the floor to a forklift.
2. The onset of symptoms resulting from this incident were alleviated to some extent by medication which the worker was already taking for pain from a prior knee injury. He was able to work from June 11th to June 21st partly because of this medication. Also he would request assistance when lifting or bending, which was required on average no more than 5 minutes out of every work day.
3. The worker first sought attention for his increased pain on June 19th, 1984 when he telephoned his family doctor, and on June 22nd, 1984, his family doctor diagnosed lumbar back strain as a result of lifting an 85 to 100 pound box. Although the worker attended at the first aid office of his employer on June 13th, 1984, by the worker's own admission, this visit was not viewed by him at the time as arising out of the June 11th, 1984 incident. Rather, it was inspired by the need for his Tylenol medication which he had been taking for his knee.
4. By the worker's own evidence, the earliest date on which he would have considered a formal report of an accident under the Act would have been June 22nd, 1984, as this is when he realized the incident of June 11th was not related to his earlier knee injury. The actual date when the report to the employer was made is disputed -- the employer stating that it was on June 29th and the worker stating it was on June 26th. The Panel accepts the worker's testimony that he first advised the employer on June 26th when he was telephoned by Nurse A, and that he reported it again to Nurse B when he telephoned the employer on June 29th.

5. The worker laid off from employment effective the first working day after his examination by his family doctor, namely, June 25th, 1984.

In this case, the worker did not seek medical attention immediately subsequent to the incident on June 11th. The 11-day delay from the injury to the receipt of medical attention was not considered as significant in this case as it might be in others for the reason that this worker was already taking analgesics which would probably have dulled any pain symptoms. That symptoms of some kind existed is indicated by the need, on June 13th, to attend at the first aid office to obtain company-supplied medication when the worker-supplied medication was not available.

With respect to the delay in the reporting to the employer, the worker testified at the hearing that he was aware of the need to formally report any accident immediately and stated that it was not until he spoke with his doctor on June 22nd that he realized the injury was to his back. Secondly, he stated that he was feeling isolated and vulnerable about his job as he had just recently returned to work from a previous compensation claim. He did not wish to appear to be a liability to the employer, which, according to both parties, was in the midst of reducing its work force by about one-third at the relevant time. The worker also stated that he tried to weather out his symptoms and was able to do so for about a week or so by restricting his bending and lifting on the job. In the panel's view, the two week delay in reporting has been satisfactorily explained in the circumstances of this case.

DECISION:

The appeal is allowed. The Panel finds, pursuant to Section 3(1) of the Act that there was a compensable accident on June 11th, 1984 arising out of and in the course of the worker's employment with the accident employer which resulted in a strain to the lumbar spine. The Panel leaves to the Board the determination of compensation payable for the periods of layoff and medical attention, without prejudice to the worker's right of further appeal should there be any dispute arising from such determination.

DATED at Toronto this 27th day of March, 1986.

SIGNED: R. Hartman, D. Jago, N. McCombie

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Workers' Compensation Appeals Tribunal

DECISION NO. 26

Tribunal d'appel des accidents du travail

Panel Chairman: N. Catton

Member: L. Heard

Member: K. Preston



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 26

THE APPEAL PROCEDURE:

The worker is appealing a decision of the Appeals Adjudicator rendered on July 8th, 1985, by Mr. A.G. Simpson. This decision confirmed a decision of the Claims Review Branch dated March 7, 1985.

The appeal was heard on January 22, 1986, by a panel of the Tribunal consisting of N. Catton, Panel Chairman, L. Heard, a member of the Tribunal representative of workers and K. Preston, a member of the Tribunal representative of employers.

The worker appeared and was not represented. The employer was notified of the hearing but chose not to participate in the proceedings. The Panel was assisted by D. Munro a member of the Tribunal Counsel Office.

The Panel heard and considered evidence given under oath by the worker. It also read the relevant forms, memoranda, reports and medical reports extracted from the WCB file appended to the Case Description.

The worker presented the Panel with a report dated January 14th, 1986, from Dr. Chaikof. The Board's Directive on "disability arising out of and in the course of employment", as well as guidelines concerning the initial adjudication of hernia claims were considered. At the conclusion of the hearing the worker and Mr. Munro made submissions.

The Panel also requested and received general medical information on herniae from Dr. Neil Waters, former Chief of Surgery at Wellesley Hospital. This information was provided to the worker and he was given an opportunity to make submissions. The Panel reviewed some medical literature on herniae and Decision 316 of the British Columbia Workers' Compensation Board.

THE ISSUE AND HOW IT ARISES:

The worker had been employed as a pressman with the same employer, for approximately eleven years. His job involved not only the operating of a printing press, but lifting printed material from a dolly at the end of the press on to a skid, which was later moved by a forklift truck to the Packaging Department.

During the week ending January 25th, 1985, the employer had an unusually large order. The size of the order permitted press runs of 5,000 sheets instead of the usual 1,000 sheets. The worker was therefore lifting 5,000 sheets, instead of the usual 1,000 sheets, when loading the skid. In addition to the size of the run, both sides of the sheets were printed. The worker was therefore also required to lift the paper a second time, to run it through the press for the second printing, instead of lifting the paper only once to place it on the skid.

During the weekend of January 26th, 1985, the worker noticed a lump in his groin. On Monday, January 28th, 1985 the worker made an appointment with his family physician, Dr. Wu. On January 31st, 1985, Dr. Wu diagnosed a right indirect inguinal hernia. The hernia was repaired on February 21st, 1985, by Dr. Chaikof. Three weeks after the surgery, the worker returned to his employment.

An inguinal hernia is an abnormal protrusion in the groin area of abdominal tissue. It occurs when an abdominal organ, usually part of the intestine, protrudes through the abdominal wall.

"(b) Indirect inguinal herniae ... occur in the inguinal area but instead of occurring directly through the abdominal wall at a site of weakness they take an indirect route through the abdominal wall by way of a canal called the "inguinal" canal. This canal is the route normally followed by the testicle when it moves out of the abdominal cavity and into the scrotum in the late months of fetal development. The sac of this canal is usually obliterated by the time of birth but if it remains open or if the abdominal wall is weak at the point where it exists, it may allow a hernia to occur if the pressure in the abdominal cavity increases sufficiently to force some contents into the sac.

There are many causes of increased intra-abdominal pressure. Lifting and straining are common causes but straining with cough, urination or bowel movements may produce similar effects. Anything which occupies space in the abdominal cavity may also increase the pressure -- enlarged liver or spleen, tumour, pregnancy, fluid, etc. have all been noted to be causative in some cases. However, none of the causes acts alone in the creation of indirect inguinal herniae. There must be a congenital weakness or a residual sac for the hernia to occur. It is the assessment of this double causation which complicates the adjudication of claims for indirect inguinal herniae."¹

The worker claimed entitlement to full temporary compensation benefits during the layoff necessitated by the surgical repair of the hernia. It is his contention that the nature of his work during the week prior to the discovery of the hernia was unusually heavy, and it was this heavy work that caused the hernia.

The claim was denied by the Claims Review Branch of the WCB. The Claims Review Branch determined that it could not be shown that the hernia arose out of a specific muscular incident or effort that arose out of the course of the worker's employment.

¹B.C. W.C.B. Decision 316

The worker appealed the decision to the Appeals Adjudicator who found that the worker had not been aware of any unusual condition until two days following a temporary lay off. The Adjudicator also stated that when considering the claim for "disablement arising out of and in the course of employment" it must be shown that the worker's disability is related to some specific occurrence in the employment. For these reasons the claim was again denied. The worker then requested that his case be heard by the Tribunal.

To be entitled to benefits, a worker must have suffered a personal² injury, by accident arising out of and in the course of employment (Section 3(1)).²

In its consideration of this case the Panel referred to the definition of accident as set out in Section 1(1)(a) of the Act. This Section reads:

"(a) "accident" includes :

- (i) a wilful and intentional act, not being the act of the worker,
- (ii) a chance event occasioned by a physical or natural cause, and
- (iii) disablement arising out of and in the course of employment;"

The Panel is left to determine whether or not the worker suffered an "accident" at work. If there is no work-related accident there can be no compensation. If the Panel finds that the worker did suffer an accident it still must determine if that accident was the probable cause of the hernia which was first noticed during the weekend of January 26, 1985.

THE PANEL'S REASONING:

The Panel found the worker to be straightforward and credible in his testimony.

In this case, the Panel noted that the worker was notified on January 24, 1985, that he would be laid off the next day because there was a shortage of work. A general lay off that coincides with the date on which a worker claims to have suffered a disability may be a factor in assessing the worker's evidence about the existence and extent of a disability. However, in this case, the Panel was impressed by the worker and believed him when he testified that he would have been able to secure work with another employer, with the assistance of his union. The Panel also noted that the worker has no real financial interest in this claim as he has already received Unemployment Sickness Benefits as well as supplementary sickness benefits from the union. Therefore in the opinion of the Panel, the general lay off had no significance in this claim.

²The "Act" referred to in this decision is the Act as it existed prior to the amendments in April, 1985.

The worker maintained that there had not been a specific incident either at work or away from work which he could associate with the development of his hernia. It is therefore not possible to establish that a "chance event" occurred during his employment.

The Panel was required to determine whether a worker, as in this case, may be entitled to benefits for a disability that may be related to his work in general in contrast to a clearly compensable disability which is related to a specific incident at his work.

In the Panel's opinion the "disability arising out of and in the course of employment" provision contemplates the possibility that disabilities may be caused by the nature of the work being performed when a specific "chance event" cannot be identified. The critical issue of concern to adjudicators in these types of cases is the causal relationship between the work and the injury causing the disability, not the identification of a specific incident.

The Panel then referred to the evidence available concerning the causal relationship between the work and the hernia. There were only two medical reports on point - one from the family physician and another from the treating surgeon. Dr. Wu, the family physician stated that:

"... it is my opinion that the hernia could very well be the result of a lot of lifting and carrying of heavy objects in the course of his employment."

Dr. Chaikof, the surgeon who wrote the report dated January 14th, 1986, which was provided to the Panel by the worker, stated:

"I certainly have every reason to believe that this patient's story is indeed an honest one, and I really feel quite strongly that his hernia was secondary to the type of work that the patient was doing prior to his injury."

The Panel also considered the Board's guidelines for the adjudication hernia claims. Specifically, Directive #14, under Section 71(3) in the Claims Services Division Manual reads:

"Hernia - Where the circumstances point to the hernia having been actually caused or aggravated, not merely brought to notice, by some specific muscular effort or incident occurring in and during the course of employment, this may be regarded as an accident and compensation benefits allowed."

It is clear that the worker has not strictly met the criteria outlined in the guideline. There was no specific incident or muscular effort at work that could be identified and therefore in keeping with the Directive, the hernia was not compensable.

After the hearing and before rendering a decision the Panel requested advise from Dr. Waters. The worker was notified of this request. The Panel was specifically interested in knowing if a hernia developed only when there was a specific triggering effort or if a hernia can result from a series of muscular efforts. We were advised that herniae develop either as a result of a specific strain or a series of strains. Dr. Waters also indicated that the frequency of herniae did not differ between office workers and manual labourers.

In the Panel's opinion, the Board's Directive for hernia claims is reasonable because a hernia can be caused by many things, some of which are clearly not work related. It would also appear that the performance of heavy work does not necessarily increase the likelihood of the development of a hernia. It is therefore reasonable for the Board to have guidelines which serve as clear reference points for adjudicators, at the initial stages, to help to differentiate between herniae which are related to work and herniae caused by other factors.

It is not reasonable, however, for the Board to deny a claim which fails to meet its internal guidelines, but does meet the statutory standard. In other words, the Board should initially look to its guidelines and if a claim can be accepted, taking into account these tests, no further review is necessary. However, if the claim fails to meet these criteria, reference should be made to the appropriate Section of the legislation which, in this case, is the Section which provides that "accident" includes "disablement arising out of and in the course of employment" (Section 1(1)(a)(iii)).

In the Panel's opinion the most probable cause of the hernia in this case was the work performed during the week ending on January 25, 1985. This opinion is supported by:

- (1) the opinion of Dr. Wu;
- (2) the opinion of Dr. Chaikof;
- (3) the fact that the hernia was noticed shortly after the worker was engaged in unusually heavy work; and
- (4) the absence of any evidence to suggest that there was a non-work related cause of the hernia.

Having accepted that the most probable cause of the hernia was the work being performed by the worker during the week ending January 25, 1985, the Panel finds that there was a " disablement arising out of and in the course of employment ". This constitutes an "accident" as defined by Section 1(1)(a)(iii) of the Act. The Panel therefore finds that the worker's hernia was caused by "accident" and he is entitled to full temporary total benefits for the period of disability resulting from the hernia.

DECISION:

The appeal is allowed. The Panel concludes that the worker is entitled to full compensation benefits during the time lost from work because of the hernia and the surgery necessary to repair the hernia.

The Panel leaves to the Board the determination of the period of time during which the worker was disabled, as well as the calculation of the amount in question.

DATED at Toronto, Ontario this 4th day of April, 1986.

SIGNED: N. Catton, L. Heard, K. Preston

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Workers' Compensation Appeals Tribunal

DECISION NO. 27

Tribunal d'appel des accidents du travail

Panel Chairman: A. Signoroni

Member: N. McCombie

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

February 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #27

THE APPEAL PROCEDURE:

The employer appeals the June 4, 1985 decision of the Workers' Compensation Board Appeals Adjudicator, W. Ireland.

The Appeal was heard on January 22, 1986 by a panel of the Appeals Tribunal consisting of A. Signoroni, Panel Chairman, N. McCombie, a member of the Tribunal representative of workers and D. Mason, a member of the Tribunal representative of employers.

The employer was represented by a Company estimator and project manager. For convenience he will be referred to as the "employer" in this decision.

The worker appeared and was represented by Mr. G. Kinasz, Barrister and Solicitor. The Tribunal was assisted by Ms. J. Marshall, a member of the Tribunal's Counsel Office.

The panel heard and considered evidence given under oath by a co-worker; by the worker's foreman; by the worker's son; by the worker himself; and by the employer. The panel also read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description materials, filed as Exhibit 1. In addition, the following Exhibits were entered as evidence and considered by the panel:

Exhibit 2 - Transcript of the WCB Appeals Adjudicator Hearing, May 16, 1985;

Exhibit 3 - A hand-drawn diagram of a "tilt-load trailer"

Exhibit 4 - Four time sheets for November 17 and 18, 1983.

The panel also read the Case Description outline of the facts which was forwarded to the parties prior to the hearing. Submissions were made by the employer, the worker's representative and the Tribunal's counsel.

THE ISSUE AND HOW IT ARISES:

The worker was employed as a general labourer with the employer, a company engaged in street paving and repair.

On November 17, 1983, the worker was assisting a co-worker in loading a "mitry cutter" onto a trailer. The worker claims that, as a result of an accident which occurred at that time, he sustained injuries to his left index finger, his right thumb, his right shoulder and his neck. The employer agrees that the accident did occur on that date, but takes the position that the only injury attributable to the accident was the laceration of the left index finger. It is the employer's contention that the other injuries did not result from the work related incident.

The panel must therefore decide, on the basis of the evidence before it, whether the November 17, 1983 accident caused not only the injury to the worker's left index finger, but also to the right thumb, right shoulder and neck.

THE PANEL'S REASONING:

The evidence presented during the hearing can be divided into three parts:

- 1) the incident itself;
- 2) what occurred after the incident; and,
- 3) the medical information.

1) What transpired during the loading of the mitry cutter was addressed by the only people involved: the co-worker and the worker himself. On virtually every detail, however, there was diametrically opposing testimony. This testimony diverged not only on the facts associated with the loading of the cutter, but also on the standard procedure for performing this task.

According to the co-worker, he sought assistance to load the mitry cutter onto the trailer and was provided with a helper who, he thinks, was the worker. In the co-worker's account, the loading of the trailer was accomplished with nothing out of the ordinary happening and he denies seeing or hearing of any accident involving the worker on that day.

The worker, however, testified that he was holding the front end of the tilt-trailer up to enable the mitry cutter to drive on. After getting onto the trailer, however, the cutter slipped back onto the ground, causing the trailer to bounce up and down. At that point, the worker testified, his left finger became caught in the mechanism of the trailer. The bouncing also resulted in his arm being struck by the trailer, throwing him to the ground.

The worker's evidence was that after this had happened, the co-worker came to his assistance and wrapped tissue paper around his finger which was bleeding. The worker positively identified the co-worker/witness as the person he had helped during the day in question.

On this point, the panel is faced with clearly conflicting evidence which lies at the heart of the matter. And in both witnesses evidence there is a number of discrepancies which the panel has noted.

The worker's description of the mechanics of the accident has varied somewhat. His letter to the WCB, for example, dated May 7, 1984, states that his left finger had been "run over by a roller". It is also the panel's opinion that a driver on a mitry cutter would have an unobstructed view of someone holding the other end of the trailer. This was contrary to the worker's contention that he could not have been seen.

The co-worker, on the other hand, would have us believe that nothing whatsoever happened when the medical records and other evidence shows -- and the employer himself concedes -- that the worker's left index finger was indeed lacerated during the day in question. Further, the panel is skeptical of the co-worker's vivid memory of what he himself describes as an uneventful routine during the course of a work day some two and a half years previous.

2) Faced with this contradictory and confusing testimony, the panel must turn to the other evidence presented by the foreman and the son.

Unfortunately, much of the evidence from the foreman is just as confusing as that of the other witnesses. He did testify clearly that, while he didn't witness the incident itself, he noted the worker's finger was bandaged and bloody on November 17, and that he had allowed the worker to rest for the remainder of the day.

In his original statement to the WCB investigator, given three months after the accident, the foreman stated that, "the only area of injury recalled was the injured employee complaining of the cut index left finger. He could not recall the injured employee mentioning the neck or back or right thumb."

Yet a year and a half after the accident, on May 14, 1985, the foreman signed a statement prepared by the worker's son for the Appeals Adjudicator Hearing, stating, "He had a bloody finger on his left hand and a swollen right thumb. Furthermore, he complained of pain on (sic) his right thumb all the way up to his neck, as well as a stiff back."

On being questioned on this discrepancy, the foreman wasn't able to provide the hearing with concrete testimony on what happened on the day of the accident with regard to complaints about the injuries to the neck and right thumb. The only material evidence he was sure of was that the worker did have a cut to his left index finger on November 17, 1983.

3) The final area of evidence which the panel considered, an area which is as unsatisfactory as the others, involves the records of medical treatment at the time.

The worker and his son both testified that they attended the Emergency Department at Northwestern Hospital on the evening of November 18, 1983. According to their testimony and the emergency report, signed by C. Pinto, M.D., only the left index finger was treated. Both the worker and his son testified that they complained about the other injuries, but were told to have them attended to by the family doctor.

In a follow-up report dated January 23, 1984, Dr. Pinto stated, "I neglected to inform you that this patient, in addition to his soft tissue injury to his finger, also injured his neck...He certainly did not complain a great deal about his neck. However he states that the neck pain and tenderness increased after assessment at the emergency department." There is no mention in this report of the right thumb or right shoulder.

The first report from the family doctor, S. Bonofiglio, M.D., is dated November 21, 1983, four days after the accident, and diagnoses: 1) neck strain 2) strain of right thumb 3) contusion of terminal phalanx of left index finger.

There is a considerable amount of contradictory evidence in this case. Nonetheless, it seems apparent that there was an accident resulting in a lacerated left finger on November 17, 1983.

There appears to have been little concern about the worker's claim by the employer until it was evident that more than a cut left index finger was involved. The employer's argument was then dependent upon the evidence of a co-worker who denied any accident or injury, despite the employer's acceptance of the accident itself, and the cut finger.

Having accepted that an accident in fact occurred, the panel was forced to question the entire testimony of the co-worker. And it was this testimony that was, to a large extent, the basis of the employer's case. In questioning that testimony and on considering the other evidence, the panel is of the view that the worker's right thumb, right shoulder and neck injury likely resulted from the same accident.

In our opinion, the worker likely did suffer an injury which, at the time of the accident, was most apparent in his left finger. As time passed, he noticed increased pain in his neck right shoulder and right thumb. However, rather than explaining this understandable delay in reporting these other injuries, the worker may have felt it necessary to describe an immediate onset of pain in all areas. This may have ultimately led to the inconsistencies apparent in the record and during the hearing.

Although the evidence presented by both the employer and the worker was less than satisfactory, the panel has weighed what evidence there was and concluded that the November 17, 1983 accident resulted in not only the lacerated left index finger, but also the injuries to the right thumb, right shoulder and neck.

THE DECISION:

The appeal is dismissed. The worker's entitlement remains as determined by the Appeals Adjudicator.

DATED at Toronto this 19th day of February, 1986.

SIGNED: A. Signoroni, N. McCombie, D. Mason.

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Workers' Compensation Appeals Tribunal

DECISION NO. 28

Tribunal d'appel des accidents du travail

Panel Chairman: N. Catton

Member: D. Jago

Member: L. Heard



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

MARCH 1986

Workers' Compensation Appeals Tribunal

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WORKERS COMPENSATION APPEALS TRIBUNAL

DECISION NO. 28

THE APPEAL PROCESS:

The worker appeals the decision of the Appeals Adjudicator, Mr. W. Ireland dated June 21, 1984 confirming the Claims Review Branch decision dated June 24, 1983.

The appeal was heard on January 23, 1986, by a panel of the Tribunal consisting of N. Catton, Panel Chairman, L. Heard, a Tribunal member representative of workers and D. Jago, a Tribunal member representative of employers.

The worker attended and was represented by Mr. E. Pukitis of the WCB Workers' Advisers staff. The employer was represented by its counsel Ms. L. Mendelson. The Panel was assisted by J.M. Marshall, a member of the Tribunal's Counsel Office. The Panel heard oral testimony, given under oath, by the worker. It also considered the medical reports, memoranda and other documents contained in the Case Description material. It also considered the recital of facts prepared by Ms. Marshall in the Case Description. These facts were agreed to by all parties. The description of issues contained in the Case Description were amended to delete any reference to a permanent disability award. This deletion was agreed to by both parties. Submissions were made by Ms. Mendelson and Mr. Pukitis as well as Tribunal counsel.

THE ISSUE AND HOW IT ARISES:

On February 14, 1980, the worker fell in the employer's washroom and injured her left heel and ankle. She was taken to Mount Sinai Hospital where x-rays were taken and her ankle was bandaged. The final diagnosis, at that time, was a soft tissue injury. She returned to work that evening and completed her shift as a switchboard operator.

The worker maintains that since the accident, she has had ongoing problems with her left ankle and foot which prevent her from walking or standing for any length of time. Despite this discomfort the worker continued working until September 19, 1982.

The reasons that the worker left her job are not clear. She contends that following the accident she was harassed by her employer and therefore had to leave her job in September of 1982. The employer asserts that the worker left her job in Toronto to move to Oshawa for personal reasons. One thing is clear, the worker did not terminate her employment because of a physical foot disability. She confirmed this at the hearing.

Following the accident, the worker did not seek medical treatment until August of 1981, eighteen months after the accident. Then she attended the Fracture Clinic at Wellesley Hospital. The initial diagnosis was plantar fasciitis, which is an inflammation of the tissues surrounding the muscles on the soles of the feet. X-rays failed to show any significant abnormalities. However, a bone scan showed activity in both ankles, which was slightly more severe in the right ankle. These results were indicative of an inflammatory or arthritic condition. The final reports from the clinic indicated that the plantar fasciitis had improved but the worker's heel was still tender.

In February of 1982, she sought the assistance of her family physician for continuing pain in her left ankle and foot. She was referred to Dr. Langer, an orthopedic specialist, who was unable to identify an organic cause for the continuing pain. He considered the worker to be fully employable.

The family physician also referred her to Dr. L.S. Davies another orthopedic specialist. He examined the patient and had x-rays taken. Apart from some slight tenderness when he palpated her heel, he was unable to identify any other abnormalities. Based on these findings he found it very difficult to account for the widespread symptoms.

Following her move to Oshawa, the worker attended another orthopedic specialist, Dr. R.H. Jamieson. In his opinion, the worker suffered a pre-existing condition - specifically a pronation tendency in both feet which could have been aggravated by the injury at work.

In the spring of 1983, the worker requested benefits for these ongoing problems from the Board. At that time, the Board conducted an investigation and interviewed co-workers and her former supervisors. The Board's investigator also contacted the worker's family physician. The Board also referred the matter to one of its physician's, Dr. Teskey. In his report, Dr. Teskey stated:

"I cannot see a two year aggravation of a flat foot. Dr. Langer and Dr. Davies one year ago reports indicate no disability." (sic)

On the basis of this information, the worker was advised by the Claims Review Branch in a letter dated June 24, 1983, that her claim for disability benefits was denied. In his letter, the review specialist indicated that he could not establish a direct causal relationship between the ongoing disability and the accident at work in February, 1980. In support of this decision the Review Specialist relied on a letter from the worker to her employer dated April 24, 1980. In that letter the worker indicated that she had recovered from her injury.

The worker then appealed this decision to the Appeals Adjudicator. The matter was heard in May, 1984. Prior to rendering a decision, the Appeals Adjudicator referred the matter to Dr. Dowd, the Director of Medical Services, who confirmed the opinion of Dr. Teskey.

The Adjudicator, in his decision, noted that the worker had continued at her job until September, 1982. He also found that the preponderance of medical

evidence did not support a relationship between the ongoing disability and the compensable injury. For these reasons the worker's claim for lost time benefits was denied. The worker appealed to the Appeals Tribunal.

In this case, there is no dispute that an accident happened at work. What is disputed, however, is whether or not there is ongoing disability, and whether or not that disability can be related to the accident of February 14, 1980.

THE PANEL'S REASONING

To assist us in determining the nature and degree of the worker's disability after February 1980, we had evidence from the worker, medical reports and statements from co-workers obtained by the Board's investigator.

The worker's testimony at the hearing was confused, but she was consistent in describing her problem. The Panel accepts that because of pain in the left heel the worker is unable to walk or stand for prolonged periods of time. It is, however, clear from the worker's own testimony that she was not prevented from carrying out her switchboard duties because of her foot problem.

We also examined the medical evidence to determine the nature of the disability. The doctors at the Fracture Clinic who examined her identified a variety of problems. The two orthopedic surgeons who examined her in Toronto were unable to identify an organic problem to account for her ongoing problems. Dr. Jamieson acknowledged the possibility that the worker's complaints were the result of an aggravation of the pre-existing condition which he diagnosed as a pronation tendency. Physicians at the Board also acknowledged an underlying problem, which they identified as flat feet. While none of the doctors were able to account for the long standing nature of the worker's complaints, there does however appear to be a consensus that the worker has an underlying condition, be it flat feet or a pronation tendency. The doctors also appear to agree that the underlying condition may cause ongoing problems.

In support of the existence of the disability, the worker's representative also referred to statements of five co-workers obtained by the Board's investigator in May, 1983. All of these co-workers acknowledged that the worker had complained about her foot and ankle between 1981 and 1982. In addition to confirming the complaints, three of her co-workers made references to the worker wearing high heeled shoes. According to these co-workers, the shoes she was wearing were inconsistent with a serious foot problem. At the hearing the worker acknowledged that she had continued to wear high heels, but said that she wore these shoes only going to and from work. She indicated that, while working she usually wore slippers. The Panel was unable to place a great deal of weight on the evidence of the co-workers. These statements were obtained by a third party and neither the worker nor the Panel had opportunity to question these women.

Accepting the worker's evidence and the findings of the doctors the Panel accepts that the worker has an ongoing problem with her left foot. The Panel also acknowledges that this problem prevents her from walking or standing for a

prolonged period of time. It is, however, unclear whether the problem is sufficient to find that the worker is disabled within the meaning of the Act. In view of the Panel's findings on the work-relatedness of any disability, it was not necessary that the Panel reach a conclusion on this point.

There must be a link between the disability and the accident at work. To establish this link the Panel considered all of the evidence.

The worker, in her signed statement to her employer dated April 4, 1980, wrote that "the injury healed and my ankle is fine now". At the hearing, the worker advised the Panel that this statement was not correct. According to the worker, her supervisor had demanded that she prepare this statement because the president of the company was angry about her WCB claim. While it may be true that the company requested the statement, the Panel was not convinced that its contents were incorrect. If the worker, as she now claims, had ongoing problems and her condition had not healed by April 1980, the Panel would have expected her to seek medical attention some time before the the fall of 1981 - one and one-half years after the accident.

The medical evidence suggests that the worker has an underlying pre-existing problem, which has not been clearly identified. However, the majority of the medical opinions do not support the proposition that the injury sustained at work has continued to be a factor aggravating the underlying condition.

The evidence, both medical and non-medical, does not support a finding that a causal relationship exists between the accident and the worker's continuing problems. The Panel is of the opinion that the absence of medical attention for the year and a half after the accident, and the content of her letter dated April 4, 1980, discount the worker's claim that her disability has been continuous from the date of the accident. The Panel also accepts the opinions of the majority of doctors who do not relate the ongoing problem to the accident at work. We therefore cannot find that a link exists between the accident and the worker's ongoing disability. The worker is therefore not entitled to compensation benefits.

DECISION

The appeal is denied. The worker is denied entitlement to further benefits for her left foot and ankle disabilities because it cannot be established that these problems are related to her accident at work in February 1980.

DATED at Toronto, Ontario this 13th day of March, 1986.

SIGNED: N. Catton, D. Jago, L. Heard

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Workers' Compensation Appeals Tribunal

DECISION NO. 29

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: B. Cook

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

Telephone: (416) 962-1600

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #29

THE APPEAL PROCEDURE:

The employer appeals the decision dated February 1, 1985, of Mr. F.H. Kaliciak, Workers' Compensation Board Appeals Adjudicator.

The appeal was heard on January 23, 1986, and reconvened on March 7, 1986, before a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, B. Cook, a Tribunal member representative of workers, and D. Mason, a Tribunal member representative of employers.

The employer was represented by Mr. C.E. Wademan, Director, Corporate Safety. The worker appeared and was represented by Ms. M. Tzaferis, a staff member of the Office of the Worker Adviser. The worker was assisted by an Italian interpreter, Mrs. M. Gracile. Two witnesses appeared on behalf of the worker. The Panel was assisted by Ms. L. Gehrke of the Tribunal's counsel office.

The Panel heard and considered oral evidence, given under oath, by the worker and her two witnesses. It also read the recital of the facts contained in the Case Description Materials, prepared by the Tribunal's Counsel Office and agreed to by the parties. The memoranda and the reports attached to the Case Description were also considered.

THE ISSUE AND HOW IT ARISES:

The issue before this Panel is whether the worker's right elbow disability, diagnosed as tennis elbow, arose out of and in the course of her employment in accordance with S.3(1) of the Workers' Compensation Act, then in effect.

The Appeals Adjudicator noted and relied on the following evidence:

1. The worker was employed as a Deli Clerk with the employer from 1973. She performed repetitive movements with a manual meat slicer which involved use of her right arm.
2. A medical report from an orthopaedic specialist, Dr. J.R. Newall, dated November 12, 1984, gave his opinion that it is entirely possible the worker's tennis elbow symptoms which began in 1978 were related to the repetitive nature of her job. Dr. Newall noted that the worker's symptoms resolved when she returned to work at a different job not requiring the repetitive movements.
3. The worker was a credible witness and her account of the events with regard to her disability being work related was accepted.
4. The employer was aware of the worker's problems with her right elbow when she laid off work in January, 1984.

The Adjudicator concluded that the worker's right elbow disability, which resulted in lost time from January 9, 1984, to May 15, 1984, arose out of and in the course of her employment with the employer. The Adjudicator directed that the worker receive compensation for the period in question.

THE PANEL'S REASONING:

At the hearing, the Panel was provided with further documentary evidence, including medical reports from Dr. Rogers and Dr. Gadacz who had earlier reported to the Workers' Compensation Board. The employer submitted notes from an interview between the worker and the employer's Occupational Health and Safety counsellor, which occurred at the work place on January 5, 1984. The interview took place four days before the worker laid off work due to her right elbow problems.

The medical reports simply repeat earlier opinions provided by the doctors to WCB, and support the worker's claim that her disability is work related.

The interview notes also support the worker's evidence, which was accepted by the Appeals Adjudicator, that she did report her elbow problems to her employer prior to laying off work in January, 1984. The notes indicate further that the worker told the employer that her doctor related her elbow problems to the repetitive work she was doing for the employer.

There were also two co-workers who were called as witnesses on behalf of the worker. The Panel found both witnesses to be straightforward and honest. The Panel accepts their evidence as accurate that the work the worker was engaged in required continual repetitive movements of the right arm and that the meat slicer the worker used was a manual and not an automatic slicer.

On the evidence before it, this Panel agrees with the decision of the Appeals Adjudicator. The Panel finds, for the reasons set out in the Appeals Adjudicator's decision, that the worker's disability resulted from her work with the employer.

At the hearing, the worker's representative argued that, in the alternative, the worker's elbow problem diagnosed as tennis elbow or tendonitis, should be considered an industrial disease under Section 122 of the Act. However, having decided that the worker is entitled to compensation under Section 3(1) of the Act, the Panel makes no finding on this point.

DECISION:

The appeal is denied. The Appeals Adjudicator decision granting the worker entitlement for her right elbow disability as arising out of and in the course of her employment, is upheld.

DATED at Toronto this 25th day of March, 1986.

SIGNED: L. Bradbury, B. Cook, D. Mason

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Workers' Compensation Appeals Tribunal

DECISION NO. 30

Tribunal d'appel des accidents du travail

Panel Chairman: R.E. Hartman

Member: B. Cook

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #30

THE APPEAL PROCEDURE:

The worker appeals the June 17th, 1985 decision of the Workers' Compensation Board Appeals Adjudicator, M.C. Turner, that he was not entitled to full benefits for the period November 29th, 1982 to August 8th, 1983.

The appeal was heard on January 23rd, 1986 by a panel of the Appeals Tribunal consisting of R.E. Hartman, Panel Chairman, B. Cook, a member of the Tribunal representative of workers, and D. Mason, a member of the Tribunal representative of employers.

The worker appeared and was represented by H. Law of the Central Toronto Community Legal Clinic. The employer was not present or represented.

V. Mark appeared on behalf of the Tribunal Counsel office. An interpreter was present before the hearing commenced but left when the worker and his representative advised the Panel that the worker was fluent in English and did not wish an interpreter.

The Panel heard and considered evidence given under oath by the worker in oral testimony at the hearing, and read the relevant forms, memoranda, reports and medical opinions extracted from the WCB file and collected in the Case Description materials. In addition, the worker's representative supplied the Panel with a transcript of the hearing before the Appeals Adjudicator.

The worker's representative confirmed that he had had an opportunity to review the Case Description materials prior to the hearing and these were then entered as Exhibit 1. Further written submissions by the worker's representative were received at the hearing, and entered as Exhibit 2. Submissions were made as well by the Tribunal Counsel Office.

THE ISSUES AND HOW THEY ARISE:

The Panel notes that there is no dispute that the worker suffered a compensable injury to his back which resulted in the worker being totally disabled for over 10 months after the accident. The Panel also notes that the worker received a 15% permanent pension award as a result of this injury, on the recommendation of a WCB doctor in July of 1983. The only matter in dispute is whether or not he was totally or partially disabled during the 8 month period from November 29th, 1982 to August 8th, 1983.

The worker was employed as a tile setter when he sustained a back injury on January 26th, 1982. At the time of the accident, the worker was 42 years of age and had been employed by the accident employer for about 1 year. He and a co-worker were carrying a 200 lb. roll of vinyl flooring up a flight of stairs.

The roll was carried on their shoulders and when the co-worker lost his balance, the worker attempted to grasp the roll to prevent it from falling. In doing so, the worker felt pain in his back, right shoulder and right upper leg. The worker laid off his work the day following the injury and received medical attention from his family doctor, Dr. Dilisi. He received medical treatment for a contusion and strain of the dorsal and lumbar spine and a contusion of the right hip and right posterior chest.

The worker received temporary total disability benefits from the WCB from January 27th to November 29th, 1982. During this period he was treated with daily physiotherapy and medication. On October 22nd, 1982 he was admitted to the Board's Rehabilitation Centre in Downsview for treatment and assessment. On November 22nd, 1982 the worker was discharged from the Centre, considered "fit only for modified work with restrictions for a period of about 3 months in repetitive bending, sustained low level work, and lifting and pulling which is not to exceed 8 kg." It appeared the Centre believed that the worker would experience full recovery after 3 months.

On his discharge, the worker immediately objected to the above prognosis. He felt he was totally disabled. The worker had been employed as a tile setter for the previous 20 years. His accident employer had no light work for him, as tile setting involved all of the restricted movements. At the hearing, the worker stated that the WCB counsellor advised him of his rights to appeal and told him to "go out and find light work". He stated that he was given no guidance with respect to job searches, nor information or advice with respect to the Board's rehabilitation services.

The worker stated that it was not until he attended at the Board offices for a pension rating in the summer of 1983, that he was referred to a counsellor who advised him of rehabilitation services. As a result of this referral he has been working with the Rehabilitation Services Branch, receiving upgrading and full compensation since August 8th, 1983.

The issue for the Panel is whether the worker was totally disabled or only partially disabled during the period November 29th, 1982 to August 8th, 1983. If the Panel concludes that the worker was totally disabled, pursuant to Section 39 of the Workers' Compensation Act as it stood prior to April 1st, 1985, no further issue arises. However, if the Panel were to conclude that the worker was only partially disabled, the matters set out in Section 41(1)(b)(i) and (ii) would have to be addressed, i.e. whether he was cooperating and available for WCB rehabilitation programs or for employment which is available and which the WCB felt was suitable for his capabilities.

THE PANEL'S REASONING:

At the hearing, the worker testified under oath that after his discharge from the Rehabilitation Centre, he experienced increased pain which was more or less constant in his lower back, and would be felt on occasion around his right shoulder. During the relevant period, he was taking medication for the pain and was under the care of his family doctor, Dr. Dilisi. He stated that during this period he would alternate sitting and walking for periods of 15 or 20 minutes each and would frequently take rest periods.

He stated he was able to do some driving, but not for prolonged periods. He did no housework which involved lifting or bending, had no recreational activities, and basically spent his time reading or resting.

The medical evidence available during the relevant period consists of reports to the WCB by Dr. Dilisi and Dr. West, an orthopaedic specialist. These were completed on questionnaire forms and consequently contain little detail.

Reports to the WCB made outside the relevant period by these same two doctors were considered by the Panel to the extent they were relevant to the issue before it. These are dealt with more particularly below.

Dr. Dilisi, the family doctor, forwarded two Progress Reports and one Special Report, each completed on WCB forms. The Progress Reports consist of a 1 page questionnaire. A doctor completes it by checking a box for "no" or "yes" to about a dozen brief questions. The relevant question is number 6, set out below:

6. At the time of the examination, could patient:

- | | |
|--|--|
| (a) do usual work? | Yes/No effective date: |
| (b) do part-time suitable work? | Yes/No effective date: |
| (c) how long will patient be disabled? | 1/7 days/7/14 days/
14/21 days/more |

NOTE: If able to work, please advise patient to contact employer. Early rehabilitation is important. Ask your patient to cooperate fully.

On January 5th, 1983, the worker was examined by his family doctor and in his Progress Report, the doctor noted that the worker was "still tender all spine & some restriction of movement". He answered 6(a) in the negative and 6(b) in the affirmative, giving an effective date of October 23rd, 1982 (the day after admission to the WCB Rehabilitation Centre).

On February 9th, 1983 the family doctor again examined the worker and in completing the Progress Report answered again only 6(a) and (b), now noting the effective date for 6(b) as November 22nd, 1982 (the date of his discharge from the Centre).

Dr. Dilisi, in completing a Special Report dated February 23rd, 1983 described the worker's physical impairment as follows:

"Restriction of movements -- I feel that patient is still totally disabled & unable to perform his duties as tile setter."

In a letter dated May 16th, 1985, submitted by the worker at the hearing before the Appeals Adjudicator, Dr. Dilisi certifies his opinion that the worker, during the relevant period,

"was not able of sitting, standing or walking for more than 15 minutes at a time without having to lie down and rest in a prone position for an equal period of time."

Furthermore, the restrictions coincided with my oral instruction to him with respect to rest and conservative treatment."

It appeared to the Panel on reviewing the above Progress Reports and Special Report that the family doctor, in his completion of 6(b), might have been reporting the opinion of the Rehabilitation Centre with respect to part-time suitable work and not his own. It appeared he considered the worker to be totally disabled as late as February 23rd, 1983 and, given his instructions as confirmed by his letter of May 16th, 1985, "suitable" part-time work would be difficult to determine.

The worker was also seen by an orthopaedic specialist, Dr. West, during the relevant period. In his letter to the WCB of March 9th, 1983, Dr. West notes that he examined the worker in July of 1982, and adds he "essentially is unchanged".

The worker was further examined on March 16th, 1983 and in his Progress Report to WCB, Dr. West completes both question 6(a) and (b) in the negative and in answer to 6(c), notes the length of disability will be more than 21 days. This is the most complete Progress Report during the relevant period.

The worker was examined by the specialist again on April 13th, 1983. In completing his Progress Report, Dr. West answers question 6(b) affirmatively giving an effective date of "November, 1982," which conflicts with his March 16th report. He does not complete 6(c).

The Panel had the benefit of a subsequent clarification of Dr. West's opinion of the worker's condition during the relevant period. In a letter to the WCB, dated May 16th, 1984 Dr. West advises:

"In summary, this gentleman does have a moderate degree of degenerative disc disease and cervical spondylosis. I gather that from the period of November 1982 to August 1983 he was incapacitated to the point that he was totally unable to work and I think that judging from his story and from the X-ray findings, that this is very possible."

The Panel notes that this concurs with Dr. West's view in his Progress Report of March 16th, 1983.

At the time of the worker's discharge from the Rehabilitation Centre in November 1982, the prognosis was that full recovery would occur in approximately three months. That this did not happen is confirmed by the award of a permanent pension in the summer of 1983. The disparity between the view expressed by the Rehabilitation Centre and the subsequent opinions given by the orthopaedic specialist and the family doctor appears to be explained, in part, by a new set of X-rays requested in May of 1984 by Dr. West which disclosed greater problems with the worker's spine.

In addressing the issue under appeal and in applying and interpreting the legislation, the Panel assesses and weighs the relevant evidence before it to arrive at a conclusion, on the balance of probabilities. The subjective testimony of the worker is useful, but is not conclusive. While medical opinions and reports can assist, their usefulness varies, depending on many factors, such as the context in which they were given and made, the doctor's qualifications, etc.

In weighing the medical evidence, in this case, the Panel was faced with a number of Progress Reports, which on their face would suggest the worker was capable of "part-time suitable work". However, when viewed with more detailed medical reports during the relevant period, together with clarification provided in subsequent reports, it becomes less clear that the worker was capable of part-time suitable work in the relevant period. On balance, the medical evidence supporting total disability is greater than that which does not. The Panel is satisfied, on the balance of probabilities, in reviewing the medical evidence together with the worker's own testimony with respect to the extent of disability, that the worker was totally disabled during the relevant period.

DECISION:

The Panel finds that during the period November 29th, 1982 to August 8, 1983 the worker was totally disabled and, pursuant to Section 39, was entitled to full benefits under the Workers' Compensation Act.

The appeal is therefore allowed and the Panel leaves to the WCB the calculation of the amount in question, without prejudice to the worker's right of further appeal should there be any dispute regarding that calculation.

DATED at Toronto this 27th day of March, 1986

SIGNED: R. Hartman, B. Cook, D. Mason

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Workers' Compensation Appeals Tribunal

DECISION NO. 31

Tribunal d'appel des accidents du travail

Panel Chairman: A. Signoroni

Member: K.W. Preston

Member: S. Fox



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

Temporary address: 920 Yonge Street, Suite 200, Toronto, Ontario, M4W 3C7

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 31

THE APPEAL PROCEDURE:

This is a worker appeal of the March 29th, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, F.H. Kaliciak. The decision rendered by the Appeals Adjudicator affirmed a decision of the Claims Review Branch dated February 6th, 1984.

The appeal was heard on January 29th, 1986, by a Panel of the Appeals Tribunal consisting of A. Signoroni, Panel Chairman, K.W. Preston, a member of the Tribunal representative of employers and S. Fox, a member of the Tribunal representative of workers.

The worker appeared and was represented by his lawyer Mr. G. Lord. No one appeared on behalf of the employer. The Tribunal was assisted by its counsel, D. Munro, a member of the Tribunal's Counsel Office.

The Panel also had the benefit of the history of the claim as it appears in the Case Description materials. These materials were marked as Exhibit #1 at the hearing. At the hearing an additional medical report from the worker's family physician dated January 14th, 1986, was introduced by the worker's lawyer and marked as Exhibit #2.

THE ISSUE AND HOW IT ARISES:

On October 6th, 1982, the worker was working on a job on the roof of the Warkworth Penitentiary. On this particular job and pertinent to his claim, is the fact that in the center of the roof there was a large heating unit which restricted the placement of the base of the hoist from being placed far enough back from the roof edge to bring the ropes close enough to the wall, or as close as usual. The worker estimated that the ropes that bring up the material were approximately two feet out from the wall. The worker also indicated that the parapet along the top of the wall was higher than usual. This necessitated him to reach out in a sort of twisting position, grab the rope or material and pull the material laterally over the parapet and then lower it to the roof. The worker claimed that this continual bending and reaching out on the date in question caused the onset of pain in his low back.

The worker reported this to a co-worker and the foreman. During the following days, the worker was given lighter duties by his foreman but his back pain persisted and on October 25th, 1982, he stopped working. At that time, the pain began to radiate around his entire back.

The worker first saw his family doctor regarding his low back problem on November 1st, 1982. On November 8th, 1982, the worker returned to his usual work. However, on November 10th, 1982, the low back pain became so unbearable that he could not continue working. Except for two brief working periods in September of 1983, and in August of 1984, the worker did not resume working until November 4th, 1985.

The initial diagnosis, as stated by the family doctor in his report dated February 7th, 1983, was sciatica due to low back injury caused by lifting. Having considered the awkward position involved in the work the worker was performing in October, 1982, as well as the reports of the family physician and the WCB doctor, Dr. G.B. Chambers, the WCB accepted the worker's claim for temporary benefits. In his report dated February 6th, 1985, Dr. Grossman described the basis of the claim as being an "aggravation" of the pre-existing degenerative disc disease.

On April 20th, 1983, the medical opinion from the WCB doctors supported granting entitlement at least to that date. However, a few days later, the decision was reached to terminate benefits as of February 15th, 1983, because the office of the family doctor was reported as having indicated to an officer of the WCB that there was no treatment beyond February 15th, 1983. This information is incorrect. Subsequent reports by the family physician as well as the testimony of the worker indicate that the worker was treated by the family physician on the following dates: March 11th, April 24th, April 27th, and May 13th, 1983.

Further to the examination of April 27th, 1983, the family physician referred the worker to Dr. C. Sorbie, an orthopaedic surgeon. According to the family physician's report, after examining the worker, Dr. C. Sorbie felt that surgical treatment was not indicated.

In April, 1983, the worker sought but was unable to obtain light work with his old employer because business was slow. A month later the employer went bankrupt. At that time the worker was in receipt of unemployment insurance benefits. These benefits were paid to him from March, 1983 to November, 1983.

The worker claims to have experienced a new onset of back pain in or about August, 1983. He states that this rendered him totally disabled from that time onward with the exception of two brief periods, previously indicated, when he was able to perform some light work. According to the worker his symptoms did not improve and in fact gradually became more pronounced.

In his report dated December 3rd, 1983, the family physician expressed the opinion that, as a result of the compensable accident in October, 1982, the worker would not be able to return to his previous occupation as a roofer. The worker was then referred to Dr. M.A. Simurda, a professor of surgery and the Chairman, Division of Orthopaedic Surgery of Queen's University.

X-rays of the worker's lumbosacral spine taken at the request of the family physician on November 16th, 1982, a few weeks after the accident, and on December 15th, 1983, disclosed the presence of degenerative change and a slight increase in the degenerative process at the time of the second X-rays.

On May 15th, 1984, the family physician wrote that the worker:

"definitely continued to suffer extreme disability during the intervening period from May 13th, 1983, until December, 1983.

He was not seen in the office regarding this problem because we had been left with the opinion of Dr. Sorbie that the problem would resolve itself. When I saw him again on December 3rd, 1983, it was evident that such was not the case and I felt that a second opinion was warranted. I am of the opinion that the worker's back problem is solely the result of the original injury of October 1982 and that he was continuously disabled from then until the present."

In his first report dated January 25th, 1984, Dr. Simurda indicated that the worker's X-rays showed some early degenerative change with early anterior osteophytes. He stated that "this man has a degenerative disc prolapse. His disability has been prolonged. I would recommend that he come into hospital to have a myelogram done to determine the degree of disc prolapse." A prolapse is commonly understood as a falling or dropping down of an organ or internal part, in this case a disc.

By a decision dated February 6th, 1984, the Claims Review Branch ruled that there was "no sufficient evidence of continuity established" and on these grounds further benefits beyond February 15th, 1983, were denied.

The results of the myelographic investigation conducted on the worker while he was hospitalized in August, 1984, are found in Dr. M.A. Simurda's report dated September 5th, 1984. In this report he states that the worker had a slight prolapse at L5-S1 without significant root compression. He indicated that in view of the fact that the worker's symptoms had improved, no surgery was proposed. Dr. M.A. Simurda felt that the worker would eventually be able to return to his work as a roofer. However, he indicated that the worker needed lighter work in the meantime to recondition his back.

In the following months, the worker did not get better and this prompted a new visit to Dr. M.A. Simurda. In his report dated December 19th, 1984, he wrote:

"This man continues to have symptomatic degenerative disc disease present since 1980 and related to his previous compensable injury. No surgical treatment is possible ... He is currently disabled and will remain so indefinitely."

Similar findings were noted in the last report from Dr. M.A. Simurda dated January 2nd, 1985. This report indicates that the worker was discharged from hospital in August, 1984, with a diagnosis of symptomatic degenerative disc disease. In addition, he wrote:

"I feel that this history to me establishes continuity of symptoms and a relationship between his compensable injury."

In February, 1985, Dr. Grossman, a WCB surgical consultant, was asked to review this case. In his report he wrote that the worker was known to have degenerative disc disease before the October, 1982, "aggravation" accident. On this ground, he was of the opinion that the "aggravation" of the degenerative disc disease resolved itself by February, 1983, and that the disability following the August, 1983, complaints was solely due to the degenerative disc disease.

The Appeals Adjudicator, in his decision dated March 29th, 1985, found the following:

1. that the worker had degenerative disc disease prior to October 6th, 1982;
2. that the compensable accident of October 6th, 1982, aggravated the degenerative disc disease;
3. that by February, 1983, the worker recovered from the aggravation of the degenerative disc disease;
4. that any continuing disability subsequent to February, 1983, was considered to be exclusively related to the pre-existing degenerative disc disease.

The final report submitted by the family doctor is dated January 14th, 1986. This report clarifies the sequence of events and reconfirms that the entire period of disability in issue resulted from the compensable accident of October 6, 1982.

In the course of his testimony under oath, the worker confirmed that both in November, 1976, and in June, 1981, he experienced episodes of low back pain. He further confirmed that in November, 1985, he had sufficiently recovered from his back disability to resume work.

The worker's lawyer submitted to the Tribunal that the worker is entitled to temporary total benefits from December 1st, 1983, until November 4th, 1985, because during this period he suffered a recurrence of the disability caused by the compensable accident of October, 1982. In the alternative, the worker is entitled to temporary partial benefits for the same period.

The issue for this Panel, therefore, is whether the period of disability claimed by the worker resulted from the compensable accident of October 6th, 1982, and, if so, whether the worker was totally or partially disabled during the relevant period.

THE PANEL'S REASONING:

During the hearing the worker was questioned by members of the Panel as well as by Mr. Munro from the Tribunal Counsel Office. Submissions were made by the worker's representative and by Mr. Munro.

The worker's representative submitted that the worker did not have degenerative disc disease prior to October, 1982. He then argued that the disability in issue was a recurrence of the disability caused by the compensable accident and that such recurrence was clearly evidenced by the continuity of complaints during the period from February, 1983, until December, 1983.

In his oral testimony, the worker testified that immediately prior to October 6th, 1982, his low back did not give him any problems. However, he admitted that in 1976 and in 1981 he had some back problems.

The medical evidence regarding the worker's condition prior to the October, 1982, accident is inconsistent.

In his report dated January 14th, 1986, the family physician indicated that he saw the worker for acute low back strain in November, 1976, and again in June, 1981. He did not order X-rays of the worker's back prior to the October, 1982, accident.

In his report dated December 19th, 1984, Dr. M.A. Simurda reported that the worker "continues to have symptomatic degenerative disc disease present since 1980."

Thus, both the family physician and Dr. M.A. Simurda acknowledged that the worker had problems with his low back prior to the accident and Dr. M.A. Simurda was of the opinion that the worker had symptomatic degenerative disc disease since 1980.

It should further be noted that the X-rays taken on November 16th, 1982, and on December 15, 1983, clearly disclose the presence of degenerative change at that time. As previously noted, the initial X-rays were taken only a few weeks after the October, 1982, accident. It is commonly accepted that degenerative change of the disc similar to that disclosed by the X-ray submitted develops gradually. For these reasons, the X-rays reports support to some extent the opinion of Dr. M.A. Simurda.

On these grounds, the Panel was satisfied that it is more probable than not that the worker was suffering from degenerative disc disease prior to the October, 1982, accident.

Dr. M.A. Simurda further qualified his opinion by stating that the degenerative disc disease was also symptomatic. However, he did not expand as to the meaning of the term "symptomatic". This term could either mean that the underlying degenerative disc disease had only periodic displays of symptoms or that it was constantly symptomatic.

On the basis of the worker's testimony that he was not experiencing low back problems immediately prior to the accident, the Panel was of the view that the worker was only suffering from periodic displays of symptoms due to degenerative disc disease and that the back pain suffered in 1981 was more probable than not one such instance.

We find that the accident on October 6th, 1982, aggravated a pre-existing degenerative disc condition. The Panel must now determine when, if at all, the aggravation resolved itself.

The WCB Appeals Adjudicator found that the aggravation resolved itself by February, 1983. The Claims Adjudicator had reached a similar conclusion on the basis of information indicating that the worker had ceased seeking medical treatment from his family physician on that date. As indicated previously, that information was incorrect. The worker continued to see his family physician until May, 1983, and he resumed his visits in December, 1983.

Dr. Grossman, in his report, indicates that by February, 1983, the aggravation of the degenerative disc disease had resolved itself. It is not clear, however, why February, 1983, was chosen as the date by which the disability was resolved, especially in view of the evidence that there was no break in medical treatment until May, 1983.

On the other hand, the family physician offered the opinion that the disability in issue resulted from the compensable accident alone. However his reports did not address squarely the issue of causation in light of the pre-existing degenerative disc disease and for this reason they could not be given the weight advocated by the worker's representative.

Dr. M.A. Simurda's reports recognized the pre-existing degenerative disc disease. Initially, Dr. M.A. Simurda indicated that the worker's disability could be related to a prolapse disc. However, a subsequent myelogram did not reveal any significant abnormality and the myelographic picture was not consistent with the worker's clinical findings. Dr. M.A. Simurda's final diagnosis was "symptomatic degenerative disc disease." Although he also expressed the opinion that the worker's disability was related to the compensable injury, this opinion was based on his assessment that the worker's history established continuity of symptoms. He did not examine the worker until more than a year after the worker's accident.

In light of inconclusive medical evidence, the Panel must turn to other evidence in determining whether there was any compensable disability after February, 1983.

Firstly, the Panel noted that the worker told the Appeals Adjudicator that there was some improvement in his condition around March, 1983, that improvement being that he was suffering less pain.

Secondly, in April, 1983, the worker sought work with his old employer but business was slow and he was not given the opportunity to resume his employment.

Thirdly, from March, 1983, until November, 1983, the worker was in receipt of unemployment insurance benefits. Initially, the worker received sick benefits but after a few weeks he applied for regular benefits on the understanding that he was available for certain work. It was the worker's explanation that he registered with the Commission because he needed money.

Fourthly, the worker testified that in the late spring of 1983, he was in a position to carry on his usual duties at the farm where he was living with his family.

Finally, the Panel noted that after May 13th, 1983, the worker did not seek any further medical help until December, 1983. Even though the worker indicated that at the time he was waiting for the report from Dr. C. Sorbie, the Panel was of the view that his conduct in this respect was a further indication that his condition had changed.

Throughout the period leading to the May 13th, 1983, examination, the worker visited his family physician on an average every two weeks. On these grounds, the Panel concluded that it is more probable than not that by May 31st, 1983, the aggravation of the degenerative disc disease resolved itself and the worker's condition reverted to the pre-accident stage.

The members of the Panel had no doubts that the worker was a very credible and honest witness and there was a great deal of sympathy for his unfortunate circumstances. However, the Panel was of the opinion, for the reasons stated, that any disability experienced after May, 1983, did not result from the October, 1982, accident. Instead, it resulted from the ongoing progression of the degenerative disc disease.

DECISION:

The worker claimed benefits for the period subsequent to December 3, 1983. Since we have found that the worker's condition returned to its pre-existing stage by May 31st, 1983, and the subsequent period of disability resulted from the pre-existing degenerative disc disease, the worker is not entitled to benefits for the period subsequent to December 3, 1983.

We note, however, that a worker's entitlement to benefits under the Workers' Compensation Act is not affected by whether or not the worker is claiming U.I. benefits. As noted in the Appeals Tribunal Decision No. 35, a worker who is found to be entitled to temporary total benefits would be paid the benefits and U.I. would be entitled to be reimbursed for the U.I. benefits paid for the same period. It would, therefore, be open for the worker in this case, if he chose to do so, to request the WCB to pay him benefits for the period from February 15th to May 31st, 1983.

DATED at Toronto this 2nd day of April, 1986.

SIGNED: A. Signoroni, K.W. Preston, S. Fox

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Workers' Compensation Appeals Tribunal

DECISION NO. 32

Tribunal d'appel des accidents du travail

Panel Chairman: S.R. Ellis

Member: S. Fox

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

JUNE 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 32

APPENDIX "A"
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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 32

THE APPEAL PROCEDURE

This is an appeal by the worker of the May 17, 1985, decision of the Workers' Compensation Board Appeals Adjudicator F.H. Kaliciak. Mr. Kaliciak's decision affirmed the decision of the Claims Review Branch dated January 29, 1985.

The appeal was heard on January 30, 1986, by a panel of the Appeals Tribunal consisting of S.R. Ellis, Panel Chairman, S. Fox, a member of the Tribunal representative of workers, and D. Mason, a member of the Tribunal representative of employers.

The worker appeared and was represented by E. Batten. The employer had notice of the hearing and elected not to appear. The Tribunal was assisted by R. Nairn, a member of the Tribunal's Counsel Office who appeared in the role of Tribunal counsel.

The Panel heard and considered oral evidence given under oath by the worker and his wife and read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials which were filed at the hearing, copies having been given to the worker's representative in advance of the hearing. The Tribunal's counsel included with the Case Description Material, a selection of medical science literature on the subject of back pain. A list of the literature is attached as Appendix A. The Panel also read the Case Description recital of facts prepared by the Tribunal's counsel and agreed to by the worker. It received at the hearing, as well, other documentary evidence presented by Mr. Batten. It heard submissions from both Mr. Batten and Mr. Nairn.

THE ISSUE AND HOW IT ARISES

On August 31, 1966, the worker (then 22 years of age) injured his back while loading 80-pound bags of the employer's product into a transport truck in the employer's shipping department. The worker had been employed in the shipping department since 1963 where the loading of transports involved lifting the 80 pound bags from a conveyor and piling them onto pallets in the transport truck. The pallets were stacked from the floor of the transport up so that considerable lifting and bending was involved in the loading process.

The injury consisted of the worker experiencing a sudden sharp pain in his lower back while in the process of moving one of the bags. The incident resulted in some discomfort and a Workers' Compensation Health Care Benefit Claim but the worker lost no time arising from the incident. The discomfort disappeared after a short period of a few days and the worker experienced no further difficulty with his back until ten years later in 1976. He had also experienced no previous back problem prior to the 1966 incident.

The worker left the shipping department in 1967 or 1968 and worked for seven or eight years in the employer's mill as a machine operator. No heavy lifting was involved in that position and the worker experienced no difficulty with his back during that period.

In 1975, the worker transferred out of the mill and became a truck driver driving a 35-ton truck used in hauling rocks from the employer's mining quarries to the mill.

On October 28, 1976, while trying to push manually a large boulder out of the way of his truck he experienced a further injury to his back. Workers' Compensation entitlement was established for a low back strain and benefits were paid until November 8, 1976, when he returned to work.

The worker suffered no further injuries to his back but he claims that the back continued to trouble him after the 1976 incident. He sought medical treatment in 1981, and by July 27, 1984, the pain in the back had reached the point where he was no longer able to function and he left work at that time and did not return until January 2, 1985.

The worker believes that his 1984 disability and lost time were the result of either his 1966 or 1976 compensable back injuries. He claims, therefore, to be entitled to temporary total disability benefits from July 30, 1984, until January 2, 1985.

The medical reports from 1984 through to the present indicate clearly that the worker is suffering from a form of degenerative disc disease. Dr. Ian L. Sutherland, an orthopaedic specialist with the Medical Centre in Peterborough, is of the view that the worker is suffering from facet joint arthritis, osteophyte formation at L5-S1, disc space narrowing at L5-S1 with gas-like density in the disc space. Anterior osteophytes are present at L5-S1 and also at the anterosuperior margin of the vertebral body of L5.

The issue for the Hearing Panel is whether there is a significant causal connection between the compensable injuries of 1966 and/or 1976, and the back condition which caused the layoff in 1984.

THE PANEL'S REASONING

This is a case of classic difficulty for the Workers' Compensation system. There is no doubt about the existence of the disability. The worker was unable to work because of back pain during the claim period. The pain is attributable in the opinion of the orthopaedic specialist to what is called, generally, degenerative disc disease. Degenerative disc disease in its various forms is a condition common to a large proportion of the population. Its causes are not well understood. Epidemiology studies do not establish any greater incident among populations of manual labourers than among office workers. Thus, it is not possible to conclude that manual labour itself causes or accelerates the condition. Obviously, a manual labourer who has a back problem has more difficulty than an office worker in accommodating the demands of his job to the condition of his back, but that circumstance does not speak to the cause of the condition.

The Workers' Compensation system is not designed to provide compensation to all disabled workers. It is an employer-paid system which is intended to compensate only for disabilities caused by employment.

Thus, in this case, if the worker's experience of acute pain following the boulder-shoving incident in 1976 was an effect of the slowly emerging underlying disease - its first symptom, if you will - and not something that caused the disease or aggravated it or significantly accelerated its development, then there is no compensation entitlement. On the other hand, if shoving the boulder produced some trauma in the back which caused or aggravated or accelerated the condition and if this caused the disabling pain in 1984, then compensation should flow for the temporary disability. In short, did the 1984 disability result from the 1976 compensable injury?

(The Panel does not believe there is any evidence to support a connection between the 1966 incident and the 1984 disability. The 1966 experience was a minor matter involving no lost-time and ten years elapsed without any further back symptoms.)

Defining the question is not difficult, the difficulty lies in answering the question in the face of medical science's lack of understanding of the causes of degenerative disc disease and its progression.

The Peterborough orthopaedic specialist gives it as his "impression" in 1985, that "the history is consistent with a couple of acute facet joint strains in 1966 and 1976, and progressive facet joint disease since 1980 to the present." "Certainly", he goes on to say, "the acute strains he had at work sound like facet joint disease, as we understand it now, and his limitation and pain over 1984 would appear to be related to the same entity" (emphasis added). This would seem to rather support the view that the 1976 incident was symptomatic of the underlying disease and not a significant factor either in causing the disease to appear or causing it's progression to accelerate.

The worker's family physician expresses the view that "his current problems are a manifestation of his old back problem. His injuries of 1966 and 1976 have probably aggravated his degenerative disc disease and increased the rate of progression." (Emphasis added.)

The WCB medical staff is of the view that the relationship between the 1966 and 1976 incidents and the 1984 disability have not been "established". The injuries in their view were "minor" and were "medically related to underlying degenerative disc disease". That is to say, they represented a temporary aggravation of the underlying disease.

The WCB medical staff did not examine the worker but it is apparent that direct examination does not help in determining the cause of the present condition, and it is at least as well placed as the family physician to form an opinion as to the probable causal relationship between the 1976 incident and the 1984 disability.

The fact of the matter appears to be that the doctors can only speculate as to the causal relationship between the 1976 boulder-pushing strain and the progress of degenerative disc disease because the medical science's understanding generally as to what causes disc disease to become symptomatic and progress is itself very limited.

In these circumstances, the Hearing Panel is of the view that the WCB and the Appeals Tribunal have to rely heavily on what is really the only actual evidence available as to the causal relationship and that is the presence or absence of

symptoms before the incident in question and the existence and continuity of symptoms following the incident. To take a clear case: if a worker has an entirely symptom-free back before a strain at work and suffers continuous agonizing back pain from the point of the strain incident onwards, it seems a reasonable conclusion that it is more probable than not that the strain was at least a significant cause of the pain even assuming an underlying degenerative disc condition.

On the other hand, if the symptoms disappear a short-time after the strain incident and do not reappear for a long period of time then in the face of an underlying degenerative disc problem it would seem equally reasonable to conclude that it is more probable than not that the previous strain incident was either a symptom of the underlying condition - an incident of temporary aggravation - or not related to it at all, and, therefore, not a significant factor in the subsequent disability.

Thus, in this type of case the Appeals Tribunal cannot help but rely heavily on evidence concerning the experience of symptoms prior to the incident, and the experience of symptoms following the incident.

There are obvious sources of evidence concerning symptoms to which the Tribunal may look in helping it to assess the worker's own evidence in this regard. One of these is the frequency and nature of medical treatment during the period in question. The absence of any such treatment would obviously not be conclusive on the question of symptoms but it would require some understandable explanation from the worker.

Another source of supporting evidence would be evidence of continuity of complaints from supervisors, fellow workers, neighbours, friends and relatives including spouses. This latter type of evidence is inherently self-serving and has to be considered with caution. The absence of corroborating evidence from fellow workers also must be considered in the light of the pressures on employees, either perceived or real, when responding to WCB investigators.

Looking then at this case in the light of those considerations, it is apparent that the crux of the matter is the symptoms experienced in the five-year period between the worker pushing the boulder in 1976, and his seeking medical treatment for his back for the first time again in 1981. Given the symptom free ten-year interval between the 1966 incident and the 1976 incident and the absence of evidence of any underlying disease problem in 1976, the Panel is satisfied that it is right to regard the 1966 incident as an isolated strain unrelated to the 1976 incident, which should not be seen as evidence of a previous existing progressing disease.

The Panel has no difficulty in accepting the continuity of symptoms as described by the worker and his wife as it relates to the period following 1981 as establishing a connection between the 1981 condition, when the worker once again sought medical treatment, and the 1984 disability. It cannot, however, assess the 1976 to 1981 period with the same confidence.

The evidence is as follows. The worker and his wife testify that he suffered back pain intermittently but regularly and of steadily increasing severity from 1976 through to 1984, and that he finally went to the doctor in 1981 when he couldn't stand it any longer. The testimony is not, however, very concrete as to

the frequency, particularly in the period closer to the 1976 incident. The evidence of one co-worker as obtained by the WCB investigator confirms occasional complaints but that of another "only during the last 6 months" (in 1984).

The Panel however, finds it particularly significant that the employer's Office and Personnel Manager indicates on the WCB Employer's Report Form (form 7) covering the July 1984 absence that the employer has applied the WCB claim number for the October 1976 incident because "we feel this is a reoccurrence (of that injury)". The employer's supervisory staff may be expected to have been aware of the nature of the worker's symptoms or complaints or their absence during the intervening period, and to have grounds for judging the worker's reliability in reporting symptoms. The employer's opinion that the July 1984 problem is a recurrence of the 1976 injury represents, in the Panel's opinion, very considerable corroboration of the evidence of the worker and his wife in that respect.

The Panel is nevertheless left uncertain as to the true nature of the connection between the 1976 incident and the 1976 - 1981 symptom experience. It believes the worker and his wife but it thinks their evidence is as likely to reflect gradually emerging problems caused by the underlying degenerating back condition of which the 1976 incident was merely a temporary aggravation, as it is to reflect problems caused or accelerated by that incident.

It is in just such circumstances, however, that the statutory presumption in favour of a Workers' Compensation claim becomes applicable. That presumption (section 3(4), revised Act) reads as follows:

- (4) "In determining any claim under this Act, the decision shall be made in accordance with the real merits and justice of the case and where it is not practicable to determine an issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant."

While the section technically applies only to disabilities arising after April 1, 1985, this Tribunal has previously decided (Decision No. 2) that it will be applied regardless of the date of the injury.

The Hearing Panel is of the view that the evidence for and against there being a significant causal connection between the 1976 boulder-shoving incident and the 1984 disability is approximately equal in weight and, accordingly, pursuant to the principle spelled out in section 3(4), the issue falls to be resolved in favour of the worker.

DECISION

1. The appeal is allowed.
2. The calculation of the amount of compensation owed for the period in question is referred to the WCB for determination.

DATED at Toronto, this 3rd day of June, 1986.

SIGNED: S.R. Ellis, S. Fox, D. Mason.

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Workers' Compensation Appeals Tribunal

DECISION NO. 33

Tribunal d'appel des accidents du travail

Panel Chairman: S.R. Ellis

Member: K.W. Preston

Member: B. Cook



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

May 1986

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 33

THE APPEAL PROCEDURE

This is a worker appeal of the July 19, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, D.R. Queen, affirming the decision of the Claims Review Branch dated November 15, 1984.

The appeal was heard on January 31, 1986, by a Panel of the Appeals Tribunal consisting of S.R. Ellis, Panel Chairman, K.W. Preston, a member of the Tribunal representative of employers, and B. Cook, a member of the Tribunal representative of workers.

The worker appeared and was represented by M.G. Falco, a worker advisor employed by the Workers' Compensation Board.

The accident employer had been advised of the appeal but elected not to appear. The Tribunal was assisted by L. Gehrke, a member of the Tribunal's Counsel Office, who appeared in the role of Tribunal counsel.

The Panel heard and considered sworn testimony of the worker, of a friend of the worker, of the worker's father and of the worker's landlady. The Panel also read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials. It also had the benefit of the history of the incident and claim as it appears in the Case Description. The worker and his representative acknowledged the general accuracy of the history set out in the Case Description. The Panel also received at the hearing a report from the family physician dated January 23, 1986; a copy of a March 3, 1982 report to the family physician from a Dr. G.N. Stanley, an orthopedic specialist, concerning the diagnosis and treatment of an old injury to the worker's right arm, and a copy of the employer's report of the accident injury, which had not previously been found in the Board's file.

Submissions were made by the worker's representative and by the Tribunal's counsel.

THE ISSUE AND HOW IT ARISES

The Appellant worker is male, age 36, and unmarried. He is a manual labourer with limited skills. He started work with the accident employer on August 4, 1981, working as a shear operator.

Prior to that he had spent about 3 years as a press set-up man and then a lead hand in the shipping and receiving department of a company in Cambridge. Before that he had been a shear operator for about 5 years with another company. He had also been employed with a music store delivering TVs, pianos and organs. He had spent about 2 years in a tobacco warehouse unloading trucks.

On October 14, 1982, the worker sustained a low back injury while at work. He was engaged in moving a bundle of steel sheets into position adjacent to his shear machine, using a sheet grabber and a hoist. The bundle of sheet steel would have weighed several hundred pounds. The worker shoved against the bundle to move it into position and experienced a sudden, sharp and severe pain in his lower back. As the worker put it: he shoved but the bundle didn't move, his back moved. The incident occurred shortly before noon. The worker went to sit in his car in the parking lot for lunch as was his normal practice. He had difficulty getting into the car and after sitting there for half an hour had very considerable difficulty getting out of the car. He was unable to continue to work, attended the Cambridge Memorial Hospital where he was examined and treated with analgesics. The diagnosis was a muscle strain in his lower back. He saw his family doctor in followup and was subsequently referred to physiotherapy.

A week later, on October 21, 1982, the back having improved somewhat, the doctor advised him to try and go back to work. He returned to work and worked at his regular job for about two weeks. The back was very painful and throughout this period he was on pain pills. On November 4, 1982, the pain became so acute that he was unable to continue and left work for the second time. He saw his family doctor again on that occasion and the doctor certified his inability to work. On November 30, his family doctor certified him fit to return to regular work. The worker returned to his employment only to find that his employer had hired a new employee to fill the worker's position and the worker's employment with the company was terminated. The worker has not been able to find employment since that time.

The worker received temporary total disability from October 14 to October 20, 1982, and from November 3 to November 30, 1982.

The worker claims that he was not fit to return to work on November 30 and has in fact suffered from debilitating lower back pain continuously since the incident at work on October 14, 1982. However, he made no further claim for compensation until early July 1984 - some 19 months later. During this 19-month period he did not seek medical treatment.

He claims to have suffered a particularly serious flare-up of the back pain on July 3, 1984. He was examined by his family physician on July 6, 1984, and a claim for compensation for the period following the July 3rd flare-up was made at that time. The appeal is in respect of the rejection of that claim.

The issue the Appeals Adjudicator was concerned about was whether the condition of the back following the flare-up on July 3, 1984, could be said to have been attributable to the work-related injury of October 1982. The relevant portion of the Appeals Adjudicator's decision reads as follows:

"There was no medical attention for the back disability between November 30, 1982 and July 5, 1984 and this is difficult to understand, particularly when the worker saw his doctor on two occasions for minor physical disabilities. Although the worker complained periodically to friends and relatives about back discomfort, the Adjudicator finds there is insufficient proof of continuing back problems throughout the entire 19 month period. Therefore, the Appeals Adjudicator accepts the advice provided by one of the Board's senior Medical Advisors and concludes the back disability subsequent to July 3, 1984, was not causally related or a continuation of the back injury from the accident on October 14, 1982..."

It is apparent that the Appeals Adjudicator does not doubt the existence of the disability. The issue, therefore, is whether the disability after July 3, 1984, is a disability caused by the October 14, 1982, accident.

It is apparent from the Appeals Adjudicator's decision that the circumstances which caused the Adjudicator and the Board's Medical Advisors to conclude that there was no causal connection was the family physician's certificate of November 30, 1982, certifying the worker as fit to return to regular work at that time and the lack of continuity in medical treatment during the 19 month period between the attempt to return to work on November 30, 1982, and the subsequent attendance at the family physician on July 6, 1984. The November 30 certificate and the lack of continuity in medical treatment obviously raised substantial doubts in the Appeals Adjudicator's mind as to the existence of the disabling condition during that period, and thus as to the connection of the July, 1984, disability with the October, 1982, accident.

THE PANEL'S REASONING

After hearing and questioning the worker, the worker's friend who lived with him from 1980 till sometime just prior to the July 1984 flare-up, the worker's father who was in touch with the worker throughout this period on almost a daily basis, and the worker's landlady in whose home the worker lived during most of this period, this Panel is entirely satisfied that the worker's condition of debilitating lower back pain has been present from the time of the incident on October 14, 1982, to the present time. The story which the worker told the Panel and which was confirmed by all of the witnesses and which the Panel believes is as follows.

The worker suffered the injury on October 14, 1982. His girl friend who came to eat lunch with him that day in his car in the employer's parking lot, confirms the difficulty he had getting in and out of the car on that occasion. He was off work for a week then went back to work, as previously described, for a couple of weeks, found that the pain was too severe and eventually had to leave work again. On or about November 30, 1982, the worker was at home treating his back with rest and heat. He had been off work at that time for about 4 weeks. He saw in the newspaper that his employer was advertising his job.

The accident employer was a small company and the worker had enjoyed working there very much. He liked the work, he liked the supervisor, and he liked his fellow employees. It was, he said, perhaps the most enjoyable job he had ever had. He was extremely upset at the prospect of losing it. He had never had a back problem before and he had been given no reason to think that this back pain would not eventually go away. Accordingly, in order not to lose his job, he decided that he would have to go back to work and just put up with the pain until his back got better.

He was, however, receiving Workers' Compensation and had been certified by his family physician as being unfit to work. He believed that he would not be accepted back by his employer unless he took with him a certificate from his family doctor to the effect that he was now able to work. He, therefore, went to the doctor, outlined the situation, and persuaded the doctor to give him a certificate to the effect that he was now fit to return to regular employment. The worker testified that his doctor did not examine him, but simply acceded to the worker's request to give him the paper that the worker thought necessary for him to go back to work and retain his job. The Panel expects that the doctor shared the worker's view that the back pain was probably a temporary thing and thought it not unreasonable that after 4 weeks he should be ready to return to work.

Unfortunately, after having obtained the doctor's certificate and returned to his place of employment, he discovered that the position had already been filled and there was no work for him. Thus, he found himself without employment and because the doctor had certified him fit to return to work, also without compensation.

The family physician had also advised him from the start that his back condition was such that there was very little that the doctor could do for him as far as treatment was concerned. It required rest and heat and it would eventually go away. In the first few weeks following the accident he had taken physiotherapy treatment, which had not proven very helpful and the doctor had indicated that there was probably no point in continuing it. The doctor had also advised him against dependency on prescription pain pills.

The worker also believed that the doctor's certificate of November 30, 1982, constituted a final termination of his compensation claim.

Accordingly, following November 30, 1982, the worker felt there was nothing to be done but to live with the situation and wait for his back to clear up. And for 19 months that is what he did.

During that period of time, the back pain was always with him. Some times the pain was less serious than at other times, and from time to time he would go for a few days without any pain at all. Then there would be a flare-up and he would be back having to go to bed. He treated himself regularly through this period with heating pads, liniments and non-prescriptive painkillers, such as anacin and tylenol, etc. He used a hot water bottle borrowed from his landlady and his girl friend looked after him when the back was particularly bad. He found that any kind of serious physical activity would trigger a further attack of pain.

He went on Unemployment Insurance for one year following November 30, 1982. After the Unemployment Insurance benefits ran out, he was supported, in part, by his girlfriend who was working, and in part by some savings that he had. In late 1983, he was forced to go on General Welfare Assistance.

At the time he went on Welfare he visited his family doctor again because the social services office needed a doctor's certificate indicating the limitations on his ability to work. At that time, the doctor certified that he was unable to do any heavy lifting or bending. That certificate relieved him of the obligation to do a job search in order to maintain his Welfare benefits and was renewed by the doctor on at least one subsequent occasion.

Throughout this period, however, the worker was attempting to find work. He satisfied the Manpower Department's requirements for a job search for purposes of Unemployment Insurance; he was registered with Manpower; he continued to look in the newspapers for job opportunities and he had a couple of job interviews - one as a shear operator (which he privately thought he could never do) and one as a light machinist. He thought he might have been able to handle the latter job. Neither interview resulted in a job offer. He tells of attempting to work one day installing aluminum siding on a house. He found that after about six or seven hours of work the pain in his back forced him to quit. That attempt at work led to a particularly bad bout with his back for several weeks afterwards.

On July 3, 1984, which is the day on which the flare-up occurred that triggered the renewed compensation claim, he testified that he got up that particular morning with an "unbelievable" pain in his lower back and concluded that he could not carry on like this anymore and had to see the doctor. He also had recently been talking with a friend who was on a Workers' Compensation committee at the friend's place of work and who also himself had a compensation claim. The friend had advised him that it might be possible to re-open the compensation claim.

The worker accordingly went to see the family physician again and he is frank to say that an important part of the reason for going to see the doctor at that time was to get him to certify that his back condition was caused by the October, 1982, injury.

The Panel has no difficulty understanding the Appeals Adjudicator's and Claims Review Branch's doubt concerning the continuity of the symptoms over the 19-month period when no medical treatment was sought. And obviously, if the worker had in fact been symptom-free for that period of time, there would be substantial reason to question the causal connection between the July, 1984, condition and the October, 1982, incident. However, the explanation we have heard from the worker and from the witnesses he called in support of his story rings very natural and true and all members of the Panel believe it. Accordingly, we are satisfied that the symptom of disabling lower back pain has been experienced by the worker regularly ever since the incident in October, 1982, and in those circumstances the Panel has no difficulty in concluding that the condition of the worker's back is related to the October, 1982, accident.

Because of the Appeals Adjudicator's decision that the disability being experienced subsequent to July 3, 1984, was not work-related, the Workers' Compensation Board has not had an opportunity to conduct a proper investigation of the nature and extent of the worker's disability as it existed in July, 1984, and subsequently. Also, the medical evidence before this Panel is not of a kind that would allow the Panel to make a decision with confidence concerning the quality or duration of the disability following July 3.

Accordingly, the Panel will refer the determination of compensation benefits for the period following July 3, 1984, to the WCB for decision through the application of its usual procedures and process.

We are, however, satisfied on the basis of the evidence that we have heard that we do have reason to be confident about the nature and quality of the disability experienced during the period from November 30, 1982 to July 3, 1984, and we are satisfied that during that period, the worker was partially disabled by a low back pain which prevented him from doing any heavy lifting or bending. We are also satisfied that he remained available for any available, suitable work during that period. Accordingly, he would be entitled to compensation benefits for his disability during that 19-month period, were he to claim such compensation.

The Panel takes note of the fact mentioned particularly by the worker's representative that the worker has not claimed compensation for the period prior to July 3, 1984. It seems likely, however, on the evidence before us, that he did not make that claim because he believed he was prevented from doing so by the doctor's certificate of November 30.

The fact that the worker elected not to include the pre-July 3, 1984, period in his new claim does not entitle - much less require - this Appeals Tribunal to ignore such entitlement when on the evidence presented it becomes obvious that it exists. The requirement under section 86g that the Appeals Tribunal not deal with issues before the Board's procedures in respect of such issues have been exhausted is satisfied here since it was implicitly a part of the Appeals Adjudicator's decision against entitlement for the post-July 1984, period, that no disability existed in the pre-July, 1984 period. Similarly, this Panel would have been unable to make a decision with respect to the period after July 3, 1984, the matter which was squarely before us, without making a finding and a decision concerning the period before that date.

DECISION

1. The worker is found to have been partially disabled by reason of a low back strain from October 14, 1982, to July 3, 1984, and subsequently as may be determined by the Workers' Compensation Board.
2. That disability was caused by an injury arising out of and in the course of employment on October 14, 1982.
3. During the period from October 14, 1982, to July 3, 1984, the worker is found to have been available for suitable work.
4. The determination of the nature of the compensation entitlement and its quantum in respect of the period from October 14, 1982, to July 3, 1984, inclusive, is left to be determined by the Workers' Compensation Board in the light of the facts in paragraphs 1, 2, and 3.

5. The question of compensation entitlement and the quantum of any such compensation following July 3, 1984, is also left to the Workers' Compensation Board to consider, starting with the fact that as of July 3, 1984, the worker has been found by the Appeals Tribunal to have been disabled by a low back strain caused by the October 14, 1982, accident.
6. The worker is reminded of the rights of the Unemployment Insurance Commission and the Ministry of Community and Social Services to recover U.I. or Welfare payments made to him in respect of any period for which he receives Compensation payments.

DATED at Toronto this 30th day of April, 1986.

SIGNED: S.R. Ellis, K.W. Preston, B. Cook

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Workers' Compensation Appeals Tribunal

DECISION NO. 35

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: D. Jago

Member: S. Fox



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION #35

THE APPEALS PROCEDURE:

The worker appeals the March 8, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, Mr. J.V. D'Andrea.

The appeal was heard on January 28, 1986, by a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, D. Jago, a member of the Tribunal representative of employers, and S. Fox, a member of the Tribunal representative of workers.

The worker appeared and was represented by Mr. M.G. Falco from the office of the WCB Worker Adviser. The employer had received notice of the hearing but decided not to appear. The Tribunal was assisted by Ms. L. Gehrke, a member of the Tribunal Counsel Office, who appeared on behalf of the Tribunal's Counsel Office.

The Panel heard and considered evidence given under oath by the worker in oral testimony and read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description materials. Mr. Falco provided the Panel with written submissions which he referred to during the hearing.

THE ISSUE AND HOW IT ARISES:

The worker's claim arises out of an accident at work on July 30, 1980. The worker, who was employed since 1979 with the employer, strained her back while lifting a box of tapes weighing approximately 40 to 50 pounds. Dr. M. Schwartz saw her on August 2, 1980 and diagnosed a "low back strain". The worker was granted entitlement to compensation by WCB. Compensation was paid until September 2, 1980, when the worker returned to work.

Following her return to work, the worker performed her regular job duties as a mold machinery operator. The worker testified that she experienced back pain and had problems with a stomach ulcer. She testified that she lost time from work due to these problems but did not submit a claim to WCB.

On February 21, 1981, the worker was fired from her job due to lost time.

The worker's evidence was that she looked for lighter work several times in June, 1981, but stopped looking after that because she knew she would be unable to do the work. The worker has not been employed since February 21, 1981.

On January 7, 1982, the worker contacted the WCB and claimed further temporary total compensation. The worker stated that it was not until her unemployment insurance benefits were terminated on January 7, 1982, that she realized she might have a further WCB claim for her continuing back problems.

¹ The Panel notes that a worker's entitlement to benefits under the Workers' Compensation Act is not affected by whether or not the worker is claiming U.I. benefits. Thus, if the worker in this case had claimed for the period prior to January 7, 1982, and if she was found to be entitled to temporary total benefits, she would be paid workers' compensation benefits and U.I. would be entitled to be reimbursed for U.I. benefits paid for the same period (Unemployment Insurance Act, S.C. 1971, section 29(3)).

The Board's investigator obtained medical reports from the doctors who treated the worker after September, 1980. Dr. Schwartz was contacted and reported on August 30, 1982, that he saw the worker on March 26, 1981, and again on January 6, 1982. He also reported six other visits between January, 1982, and July, 1982. The worker testified that, in fact, she saw Dr. Schwartz three or four times a month during the period from March, 1981, to July, 1982, and does not know why these visits are not recorded. Dr. Schwartz also wrote "I feel that this patient's recurrent back pain is a direct result of her original back injury in 1980".

The worker was examined by Dr. Kummell at the WCB on December 2, 1982. Dr. Kummell reported that she "has a reasonable range of movement in her back". He also noted that the "lumbar spine is somewhat flattened". Dr. Kummell concluded that "this lady may well have a certain degree of degenerative osteoarthritis of her lumbar spine at this time with some degree of mechanical low back pain", but he went on to state "I cannot relate her professed subsequent disabilities to the lifting incident of July, 1980."

In June, 1983, the worker moved to Calgary, Alberta and testified that she saw several doctors there, including several specialists, for her back. The worker's evidence was that her back was bothering her throughout this period and that the pain spread from her back to her left leg.

Dr. Pecharsky, her family doctor in Calgary, reported to WCB that he had treated the worker since February 8, 1984, for her back and stated "she is experiencing low back pain which she thinks is related to the WCB injury as stated above. This certainly may be the case."

An orthopaedic specialist, Dr. M. Austin, reported to WCB on October 21, 1985, that the worker had "a full range of movement in all directions, and a normal straight leg raise of 90 degrees". Dr. Austin concluded that she had "some mild degenerative X-ray changes, not necessarily translating into physical disease, and a great deal of functional involvement". At the hearing, the worker testified that Dr. Austin had the wrong X-rays and, by mistake, was reviewing her daughter's X-rays.

There is also a report dated October 16, 1985 and included in the materials before the Panel from Dr. K. Anquist, an orthopaedic surgeon. He reported to Dr. Pecharsky that "X-rays of the lumbosacral spine taken in September, 1983, did not show any gross abnormality. I repeated X-rays of her hips and lumbosacral spine. She may have some early degenerative changes in the hips but again her lumbosacral spine looks within normal limits for her age".

When the matter came before the Appeals Adjudicator in March, 1985, the Adjudicator denied further entitlement. The Adjudicator relied on the Board's investigation and the opinion of the Board's medical advisor and concluded that no relationship was established between the worker's low back disability and the accident of July 30, 1980.

The worker claims that she had no back problems prior to the accident in July, 1980. She claims further that her continuing low back pain is related to that accident.

The issue for this Panel, therefore, is whether the worker is entitled to temporary disability compensation for the period following January 7, 1982, in accordance with Section 39 or Section 41 of the Workers' Compensation Act then in effect.

THE PANEL'S REASONING:

During the hearing the worker was questioned by members of the Panel as well as by her representative and by Tribunal Counsel. Submissions were made by the worker's representative and by Tribunal Counsel.

In this case, if the evidence indicates that the worker was disabled during the period following January 7, 1982, and it is shown that her disability resulted from the original compensable injury, then she is entitled to compensation for the disability subsequent to January, 1982.

The Panel has reviewed all the medical evidence filed at the hearing. It appears that the worker saw a number of doctors during the period from 1981 until 1985, and that is a possible indication of some disability. There is, however, conflicting evidence on the issue of whether the problems the worker experienced with her low back resulted from the 1980 accident. The family doctor in Ontario gave his opinion that there was a direct relationship between the accident and the back pain. The family doctor in Calgary wrote that "there certainly may" be a relationship.

However, the orthopaedic specialists, Dr. Austin and Dr. Anquist, who examined the worker found some mild degenerative changes but they did not relate those changes to the accident at work. Dr. Anquist stated that the worker's spine was within normal limits for her age, which at the time was 56.

The WCB medical advisor examined the worker. He also noticed some degenerative problems but concluded that those problems were not related to the July, 1980, incident.

The worker challenged the medical reports of the orthopaedic specialists on grounds that one doctor was incorrect as to the number of visits and that one doctor relied on X-rays that did not belong to her. The Panel was unable to find that these grounds for challenging this evidence were credible.

Having regard to the opinions of the orthopaedic specialists and to the medical evidence as a whole and to the Panel's own questioning and observation of the claimant, this Panel concludes that the evidence does not support a relationship between the 1980 accident and the worker's subsequent problems.

DECISION:

The appeal is denied. The Panel finds that the worker was not temporarily disabled for the period following January 7, 1982. Therefore, the worker is not entitled to further compensation from WCB.

DATED at Toronto this 7th day of March, 1986.

SIGNED: L. Bradbury, D. Jago, S. Fox

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Workers' Compensation Appeals Tribunal

DECISION NO. 36

Tribunal d'appel des accidents du travail

Panel Chairman: I.J. Strachan

Member: L. Heard

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 36

THE APPEALS PROCEDURE

The worker appeals the decision of the Workers' Compensation Board Appeals Adjudicator, R.P. Slauenwhite, dated May 6, 1983, denying entitlement for a shoulder disability.

The appeal was heard on January 29, 1986, by a Panel of the Workers' Compensation Appeals Tribunal (the "Tribunal") consisting of I.J. Strachan, Panel Chairman, L. Heard, a member representative of workers, and D. Mason, a member representative of employers (the "Panel").

The worker was present at the hearing and was represented by L. Schultz. The employer was represented by Mr. Wright. The Panel was assisted at the hearing by G. Dee, of the Tribunal Counsel Office ("TCO").

The Panel heard and considered testimony under oath of the worker and the worker's wife. The Panel also read the relevant forms, memoranda, reports, statements and medical reports extracted from the WCB file and collected in the Case Description Materials together with the descriptive summaries. The Case Description, as approved by the parties, was marked as Exhibit #1 at the hearing.

The Panel also had the benefit of certain additional materials prepared after the Appeals Adjudicator hearing, including the letter of December 30, 1985, from TCO to Dr. Satbachan Singh requesting additional information (Exhibit #2), the letter of January 22, 1986, from Dr. Singh in response to the TCO letter (Exhibit #3) and a collection of additional medical reports and medical correspondence distributed to the parties and filed by the worker (Exhibit #4).

THE ISSUE AND HOW IT ARISES

The worker's claim dates from his work shift on October 13, 1982, which, the worker contends, resulted in a recurrence of a disability stemming from his compensable industrial accident of September 23, 1980.

The worker has been employed as a truck driver for approximately 30 years, the last 10 of which were with the employer of record in this case.

In reconstructing the events, it is useful to begin with the accident of September 23, 1980, at which time the worker, while standing on a bundle of steel, fell approximately four feet and landed on his left side. As a result of the fall, he fractured his left thumb, jammed his left shoulder, twisted his left ankle and suffered a laceration on his left elbow. He also sustained bruises to his left shoulder and left mid-back. As a result of these injuries, the worker did not return to work until November 10, 1980. Following his return to work the worker indicated that he continued to have problems with his left shoulder. In his notes of January 28, 1981, Dr. Hunt notes "left shoulder hurts at night - had therapy last week - stiffness".

The worker indicated that he was able to continue with his regular employment, although towards the end of each week he experienced difficulty with his neck and shoulders and experienced pain radiating into his left shoulder. The worker indicated that his daughter would massage his neck on weekends and he occasionally received manipulation treatments from Dr. Hunt when he attended at the doctor's office. Dr. Hunt's notes of September 1, 1981, contain reference to a manipulation treatment.

The worker testified that, in view of the increasing difficulty he experienced towards the end of the week, he would normally not work on Friday; although he conceded that, under the mileage formula developed by his employer, he would not be required to work on Friday in the event he achieved his mileage quota during the Monday - Thursday period.

The worker indicated that he had also discussed his left shoulder problem with the WCB Pension Medical Officer when he attended at the WCB Offices for a pension medical examination on May 7, 1982. The purpose of the visit was to assess the condition of his thumb with a view to recommending a disability pension. According to the worker, the Pension Medical Officer indicated that his shoulder problem had been covered in a report filed with WCB by Dr. Singh and it was not necessary to refer to it in her report.

On October 13, 1982, the worker carried out his normal duties including hooking up the trailer to his cab - an action which involved winching the dolly wheels on the trailer and hooking up the various hoses and attachments. He could not recall any specific incident or act that created unusual pain in his left shoulder. When a fellow worker brushed his left arm during the lunch stop, the worker noted it was extremely sore. He indicated that a normal shift lasted between 10 and 13 hours, often involving approximately four and one-half hours running time in each direction with one break (for lunch or coffee) during each four and one-half hour run.

He subsequently completed his shift on Thursday, October 14, 1982, but did not work on October 15. On Saturday, October 16, he attempted to reach his family doctor and when he was unable to contact Dr. Hunt, he reached Dr. Singh who attended him at the St. Catherines General Hospital. Dr. Singh injected cortisone into the left shoulder. The worker subsequently received a further injection into the left shoulder as well as one injection into the right shoulder. The worker has been unable to return to work since October 14, 1982.

The evidence of the worker's wife indicates he continued to complain of difficulties with his left shoulder during the period November, 1980, to October, 1982. She testified that their daughter gave the worker neck and shoulder massage on weekends and that it was necessary for her to constantly change sides on the bed to accommodate her husband's shoulder problem. Apparently the shoulder problem would be alleviated temporarily by changing sleeping positions. She testified that his left shoulder condition appeared to vary with the weather and that he had been unable to cut the grass at their home for the past five years. She described his life since the October, 1982, incident as "sedentary".

The worker suffers from degenerative disc disease ("DDD") and was aware of the presence of DDD in the fifth, sixth and seventh cervical vertebrae prior to September 12, 1980. The worker indicated that when making long trips prior to this date, he had experienced radiation of pain into his right arm but very limited

symptoms in his left arm. He could not recall losing any time from work because of the pain in his right arm and was certain he did not lose any time because of his left arm prior to September 23, 1980.

The issues for the Tribunal to determine therefore are as follows:

- (1) Has the worker established his claim that the lay-off after October 14, 1982, resulted from injury caused by the accident of September 23, 1980?
- (2) In the event the 1982 disability did not result from the injury caused by the 1980 accident, is the worker entitled to compensation on the basis that the 1982 incident aggravated a pre-existing non-compensable condition?
- (3) In addition, if compensation is not granted for either of the above reasons, does the Tribunal have jurisdiction to determine the question of whether or not the worker's disability was related to his duties as a truck driver?

THE PANEL'S REASONING

There is no dispute that the worker suffered a compensable injury arising out of the accident of September 23, 1980. The worker received temporary total benefits for the period September 24 to November 10, 1980, and subsequently received a 1.5% lump sum award for the permanent disability.

It is obvious from the medical reports and supporting material that the September 23, 1980, accident was a significant accident as it resulted in injuries to the worker's left side including his thumb, elbow, shoulder, ankle and mid-back. The accident is described in WCB Memo #7 as "an impressive accident". Memo #7 goes on to note that the injury was significant enough to aggravate cervical disc disease and cause pain to radiate into the worker's left shoulder. The notes of other WCB personnel indicate that benefit of doubt should be extended to the worker and the claim should be allowed if it is "medically compatible".

There is evidence of continuity of complaints taken from the testimony of the worker (described by the employer as a "reliable and trustworthy employee"), the testimony of his wife and the notes of Dr. Hunt. However there was no change in his job-related activities between September 23, 1980, and October 13, 1982; nor is there any evidence of a new accident during that period which would give rise to a new injury to his left shoulder.

The Panel is satisfied that a claim for low back pain in August, 1981, resulting in a lay off of four days, is not related to the matter before the Panel.

The crucial medical opinion was requested from the WCB consultant on March 23, 1983, with respect to the relationship between the worker's disability resulting in his absence from work effective October 15, 1982, and the injury sustained in the September 23, 1980, accident, possibly aggravated by circumstances of his employment on October 13, 1982.

In that opinion the consultant notes

"I do not believe that this worker's problems with his left shoulder are related to the relatively minor injury sustained in September, 1979 and where complaints seem to have started in November, 1980 - more than a year later." (emphasis added)

It is apparent that the Appeals Adjudicator in his decision of May 6, 1983, relied upon this opinion. He concludes in his final paragraph

"However, in accepting the opinion of the Surgical Consultant, the Appeals Adjudicator concludes... (the worker's)...shoulder symptoms necessitating his absence from work effective October 15, 1982, cannot medically be accepted as attributable to his industrial accident of September 23, 1980..." (emphasis added)

Two items stand out in the Surgical Consultant's report; the first being the description of the September 23, 1980, injuries as "the relatively minor injury" which description must be contrasted with the medical reports describing the injuries to the worker's left thumb, elbow, shoulder, ankle and mid-back and also with the WCB description of the same accident in Memo #7 as "an impressive accident".

The second significant point concerns an apparent confusion over the actual accident date and the time lapse preceding the complaints starting in November, 1980. It is obvious from paragraph 2 of the consultant's opinion that the consultant is under the impression that this "relatively minor injury" was sustained in September, 1979, (as opposed to the actual date of September 23, 1980) and that the worker's complaints did not start until November, 1980. In other words, the consultant is obviously under the impression that a 14 month period has elapsed between the sustaining of the "relatively minor injury" and the commencement of complaints concerning the left shoulder in November, 1980. The consultant emphasizes this impression by adding the words at the end of his second paragraph - "more than a year later".

In fact, the complaints were not made more than a year later; the complaints were made two months after the accident.

In the opinion of the Panel, this obvious confusion greatly reduces the weight to be given to the consultant's opinion - an opinion which appears to be crucial to the decision arrived at by the Appeals Adjudicator.

The Panel has also had the advantage of the medical report from Dr. Satbachan H. Singh of St. Catharines Orthopaedic Associates dated January 22, 1986. In giving the impression that "the left shoulder has not done well because of the injury...(the worker)...had in 1980 when he fell on the left side...", Dr. Singh notes that, although the worker had scapular pain soon after the accident related to the cervical disc disease, he had definite local pathology affecting the left shoulder. Dr. Singh explains the problem with the double pathology on page two of his opinion letter

"It would seem that his left shoulder symptoms were masked by his cervical spondylosis and radiculitis for which he was treated

and which was subsequently investigated by EMG which indicated C8-T1 radiculitis. It is my experience that, quite often, with double pathology, it can be difficult to isolate the shoulder problem from the referred pain from the neck."

Dr. Singh goes on to state:

"... However, on the left side he still has symptoms and residual stiffness. It is my impression the left shoulder has not done well because of the injury he had in 1980 when he fell on the left side, sustaining a fracture of the first metacarpal, bruising of the upper ulna region, and capsular injury of the ankle. Even though he had scapular pain soon after the accident related to the cervical disc disease, he had definite local pathology affecting the left shoulder."

In reviewing the conflicting medical opinions offered by the WCB consultant and Dr. Singh, the panel has given greater weight to the opinion of Dr. Singh and accepts his explanation that double pathology made it difficult to isolate and focus upon the earlier shoulder problem.

Although the worker's pre-existing condition may have contributed to the disability suffered after the 1982 incident, the Panel has concluded that the 1980 compensable injury was a significant cause of the later disability. Accordingly, the left shoulder disability suffered by the worker after October 14, 1982, resulted from the injury caused by the 1980 work accident and the worker is entitled to compensation on this basis.

The Panel leaves to the Board the determination of compensation for the worker, without prejudice to the worker's right of further appeal should there be any dispute arising from such determination.

With respect to the employer's claim for Second Injury Enhancement Fund relief, this matter has not yet been dealt with by the Board and accordingly the Tribunal does not have jurisdiction to consider the request of SIEF relief.

DATED at Toronto this 9th day of June, 1986.

SIGNED: I.J. Strachan, L. Heard, D. Mason.



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

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INTERIM DECISION NO. 37

Panel Chairman: J. Thomas

Member: D. Jago

Member: L. Heard



JUNE 1986

RESEARCH AND PUBLICATIONS DEPARTMENT
Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

INTERIM DECISION NO. 37

THE APPEAL PROCEDURE

The worker appeals the decision of the Workers' Compensation Board Appeals Adjudicator J.V. D'Andrea, dated February 20, 1985, which denied entitlement to payment of temporary supplementary pension benefits under section 43(5) of the Act¹ from and after June 5, 1984.

The appeal was heard on January 27, 1986, and April 10, 1986, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, D. Jago, a member of the Tribunal representative of employers, and L. Heard, a member of the Tribunal representative of workers. At the hearing on January 27, 1986, V. Mark attended from the Tribunal Counsel Office to assist the Panel.

The worker attended the hearing on both occasions and was represented by J. Duff, from the United Automobile Workers. The employer was represented by G. Cavan on both occasions.

The Panel and the parties were provided with Case Description Materials containing the relevant forms, memoranda, reports, and medical reports from the WCB file. The Case Description Materials were marked as Exhibit #1.

The hearing on January 27, 1986, was adjourned at the request of the worker and on the consent of the employer, to enable the worker to obtain more evidence with respect to job search activities and medical reports covering the relevant period. Prior to the resumption of the hearing on April 10, 1986, the Panel was provided with a five-page job search which was marked Exhibit #2 at the hearing.

The worker gave evidence under oath in oral testimony on both occasions and was questioned by the employer representative, by Tribunal Counsel Office, and by members of the Panel. Submissions were made by the worker and employer representatives.

THE ISSUE AND HOW IT ARISES

The worker injured his left ankle at work on January 25, 1982. Prior to his accident he had been employed for approximately ten years with the accident employer as an assembler and as a fork lift operator. Previous employment included work as an upholsterer for approximately four years, as a shipper/receiver for approximately three years, and as a labourer with a paper company.

The worker was paid temporary total disability benefits from the date of his accident, January 25, 1982, until he returned to his regular employment on November 2, 1982. A reconstruction of the left lateral ligament was performed in June, 1982. Some time after his return to work in November, 1982, the worker began experiencing increased pain and swelling in his ankle and was again forced to

¹As it existed before April 1, 1985 ("the old Act").

discontinue employment on June 21, 1983. He received temporary total benefits until early November, 1983, when he was found by the Board to be partially disabled and began working with the rehabilitation counsellor. Full benefits were continued under section 41 of the old Act until June 5, 1984.

On May 25, 1984, the worker was awarded a 5% permanent pension. After full benefits were terminated on June 5, 1984, the worker received his monthly 5% pension award.

The worker requested a pension supplement under the provisions of section 43(5) of the old Act. This request was denied by the Claims Review Branch and the worker's appeal to the Appeals Adjudicator was dismissed on the grounds that the worker's impairment of earning capacity was not significantly greater than usual for the nature and degree of his injury and also because, in the opinion of the Appeals Adjudicator, the worker had not been making a sincere effort to attempt to return to work. It is from that decision that the worker appeals to this Tribunal.

A report from the worker's family doctor, Dr. Modiselle, dated August 12, 1985, indicates that the worker was able to report to work as of September 1, 1985. The worker agrees with Dr. Modiselle's suggested return to work date. Thus, the worker claims entitlement to a temporary pension supplement from June 5, 1984, to September 1, 1985. That is the main issue before this Panel.

The underlying issues to be considered by this Panel in determining whether the worker is entitled to a temporary pension supplement arised from the wording of section 43(5) of the old Act. That section provides as follows:

"Notwithstanding subsection (1), where the impairment of earning capacity of the worker is significantly greater than is usual for the nature and degree of his injury, the Board may supplement the amount awarded for permanent partial disability for such period as the Board may fix, provided that the total sum of such supplement and award shall not exceed in any case the like proportion of 75% of his average weekly earnings during the twelve months immediately preceding the accident or such lesser period as he has been employed, and provided that he cooperates in and is available for a medical or vocational rehabilitation program which would in the opinion of the Board aid in getting him back to work, or accepts or is available for employment which is available and which in the opinion of the Board is suitable for his capabilities."

A threshold issue to be decided in considering entitlement for a temporary pension supplement is whether the impairment of earning capacity of the worker is significantly greater than is usual for the nature and degree of his injury. This is a condition that must be met in order to be eligible for a pension supplement.

If it is established that the worker's impairment of earning capacity is significantly greater than is usual for the nature and degree of his injury, entitlement to a temporary pension supplement is further dependent on establishing either that the worker cooperates in and is available for a Board-supported medical or vocational rehabilitation program, or the worker is available for work which is available and, in the Board's opinion, suitable.

The issues can be summarized as follows:

1. Between June 5, 1984, and September 1, 1985, was the worker's impairment of earning capacity significantly greater than is usual for the nature and degree of his injury? If not, the worker is not entitled to a temporary pension supplement.
2. If question 1 is answered in the affirmative, has the worker cooperated in and made himself available for a Board-supported medical or vocational rehabilitation program?
3. If the answer to question 1 is in the affirmative but the worker has not cooperated in and made himself available for a Board supported medical or vocational rehabilitation program, has he accepted or made himself available for employment which is available and, in the Board's opinion, is suitable?

THE PANEL'S REASONING

During the course of the hearing on January 27, 1984, the Panel advised the worker and his representatives that there were no medical reports covering the period of time from June 5, 1984, to September 1, 1985. During this same time period, there was no documentary evidence about job search activities. The worker told the Panel that he had left his job search lists at home. Accordingly, the January 27 hearing was adjourned on the consent of the employer to permit the worker to obtain medical reports and documentary evidence with respect to his job search activities.

On February 4, 1986, the Tribunal Counsel Office sent a letter to the worker's representative confirming the Panel's request for documentary evidence about his job search activities and all medical reports from all physicians who examined or treated the worker's ankle condition between June, 1984, and September, 1985.

Prior to the continuation of the hearing on February 4, 1986, the worker provided the Appeals Tribunal with a five page job search list. At the hearing on April 10, 1986, the worker further advised the Panel that, in addition to delivering to the Tribunal the job search list, he had also delivered a letter from Dr. Modiselle confirming the dates on which the worker had been examined between June, 1984, and September, 1985. The Panel was unable to locate this document and instructed Tribunal Counsel Office after the conclusion of the hearing to contact Dr. Modiselle. The Panel was advised by Tribunal Counsel Office that Dr. Modiselle was unable to locate a copy of the letter referred to by the worker. Dr. Modiselle told the Tribunal Counsel Office that he keeps copies of all such letters.

Although the Tribunal has an independent investigatory power under which it can, in appropriate circumstances, obtain relevant medical reports and documentation necessary to determine appeals, this Panel is of the view that it ought not to exercise these powers in the present case. Before the hearing commenced on January 27, 1984, the worker and his representative were well aware of the issue under appeal. At the outset of the hearing on January 27, 1984, they agreed that the issue of a temporary pension supplement required the worker to establish that his impairment of earning capacity was significantly greater than is usual for the nature and degree of his injury. They also agreed that availability for work was an issue before the Panel. However, because it appeared to the

Hearing Panel on January 27, 1984, that the worker or his representative had simply omitted to gather together and bring to the hearing relevant documentary evidence, the Panel granted the worker an indulgence by adjourning the hearing to permit the evidence to be collected.

At the conclusion of the hearing on January 27, 1986, this Panel was satisfied that the worker and his representative fully understood what was required of them in preparing for the next hearing date and also understood that the adjournment was being granted to assist them in putting together documentary evidence which ought to have been available to the Hearing Panel prior to January 27, 1986.

Moreover, the evidence requested by the Hearing Panel was carefully outlined to the worker's representative by letter from the Tribunal Counsel Office dated February 4, 1986. The materials, in our view, were readily obtainable by the worker or his representative. The job search list, according to the worker, had been left on his dresser when he came down to the hearing on January 27, 1986. The medical reports could have been obtained by visiting his family doctor. We accept the report from Tribunal Counsel Office that Dr. Modiselle was unable to find any record of a request by the worker for medical reports and we conclude that efforts were not made to obtain them.

Taking all these factors into account, this Panel is of the view that it must decide the appeal on the material before it and that this is not an appropriate case to embark on further investigations in light of the ample opportunities which have been afforded to the worker and his representative to obtain such documentation.

Is the Impairment of Earning Capacity Significantly Greater than Usual for the Nature and Degree of the Injury?

The worker was awarded a 5% permanent pension on May 25, 1984. Authority for awarding permanent pensions is found in section 43(1) of the old Act:

"43(1) Where permanent disability results from the injury, the impairment of earning capacity of the worker shall be estimated from the nature and degree of the injury, and the compensation shall be a weekly or other periodical payment during the lifetime of the worker, or such other period as the Board may fix, of a sum proportionate to such impairment not exceeding in any case the like proportion of 75% of his average weekly earnings during the twelve months immediately preceding the accident or such lesser period as he has been employed."

Thus, a 5% permanent pension award reflects the 5% impairment of earning capacity of the worker, as estimated from the nature and degree of the worker's injury. The permanent pension award is sometimes computed from a rating schedule as provided by section 43(3):

"The Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations that may be used as a guide in determining the compensation payable in permanent disability cases."

We are of the view that the permanent pension award is intended to reflect the "usual" impairment of earning capacity. To establish entitlement for a pension

supplement, a worker must establish an impairment of earning capacity which is "significantly greater than is usual for the nature and degree of the injury". In this case, the worker would have to establish that between June, 1984, and September, 1985, his actual impairment of earning capacity was significantly greater than 5%.

The factors that go into determining impairment of earning capacity are included in the issues to be canvassed by the Appeals Tribunal in the Leading Case Strategy on Pensions. We do not intend to pre-empt the mandate of the Panel hearing the Pensions Leading Case Strategy by considering in this case what ought to go into a determination of impairment of earning capacity. We do note, however, that at least by May, 1985, the worker told the Panel that he thought he could return to his pre-accident employment. On this issue there is no medical opinion to the contrary. It would therefore appear that by May, 1985, the worker himself did not consider his impairment of earning capacity to be significantly greater than a 5% impairment because he was of the view that he could return to his pre-accident employment. We therefore conclude that during the period May, 1985, to September, 1985, the worker is not entitled to a pension supplement because he has not established an impairment of earning capacity significantly greater than is usual for the nature and degree of the injury.

Between June, 1984, and May, 1985, the worker testified that he was of the opinion that he was incapable of returning to his regular employment and he doubted whether he could do modified employment. For reasons mentioned, this Panel does not wish to embark on an investigation as to whether, during the period June, 1984, to May, 1985, the worker's impairment of earning capacity was significantly greater than usual for the nature and degree of his injury. However, without deciding this issue, we are still able to consider whether, assuming the worker were able to establish that over this period his impairment of earning capacity was significantly greater than is usual for the nature and degree of his injury, has he otherwise disentitled himself to a pension supplement by failing to cooperate with a Board supported vocational or medical rehabilitation program or by failing to accept or be available for suitable and available work.

Did the Worker Cooperate in and be Available for a Board Supported Medical or Vocational Rehabilitation Program

The evidence before the Panel is that vocational rehabilitation services were provided to the worker from the end of October, 1983, to early May, 1984. The worker was admitted to the Board's Hospital and Rehabilitation Centre in October, 1983, and upon discharge on October 24, 1983, it was recommended that the worker was capable of returning to modified work. It was further indicated in the discharge report that the worker "may be left with some limitation of movement in the ankle of a very minor degree."

As a result of discussions with vocational rehabilitation personnel at the time of his discharge from the Hospital and Rehabilitation Centre, the worker agreed to a rehabilitation program and accordingly was placed on temporary total benefits under section 41(1)(b) of the Act. A vocational rehabilitation history memo dated November 24, 1983, confirms that the worker was advised by a vocational rehabilitation counsellor to conduct a job search and to register with the Canada Employment Centre. There is also indication in the file that the worker was advised of the requirements of section 41 of the Act and particularly that the continuance of benefits depended upon his act of participation and cooperation in a

rehabilitation program. It was also acknowledged that his accident employer could not provide suitable work as of November, 1983.

In a vocational rehabilitation follow-up report dated January 31, 1984, it was noted that the accident employer did not foresee the possibility of modified work being made available in the foreseeable future. It was suggested that a general workshop assessment at Scarbrook General Workshop Enterprises be undertaken by the worker to determine his physical capabilities and that the worker undergo psychological vocational testing.

The worker commenced a work assessment program at Scarbrook on March 5, 1984. A closure report from Scarbrook dated May 9, 1984, recommended closure of the rehabilitation file on account of the fact that objective findings suggested that the worker was capable of modified employment but the worker himself was claiming total disability and was placing unreasonable physical restrictions on himself. Full benefits were terminated on June 5, 1984.

The worker told the Panel that he did in fact consider himself totally disabled at the time of his discharge from Scarbrook. During the time that vocational rehabilitation services were provided to the worker, it would appear that the worker's family physician was of the opinion that he was not capable of returning to regular or part-time modified work. Other medical reports suggest a contrary conclusion. In particular, in a report dated August 22, 1983, Dr. Urovitz, an orthopaedic surgeon, reached the following conclusion after examining the worker:

"Although this man may have some residual inflammation about the ankle joint I believe some of the responses are somewhat exaggerated and inappropriate today and there may be some underlying psychological factors which are subconsciously magnifying his concept of his disability. I have no specific orthopaedic recommendations to make to this gentleman."

A report of Dr. Sehmi, an orthopaedic surgeon, dated June 23, 1983, comments:

"Clinically, the lateral ligament which I repaired is quite stable and is not causing any problem."

The report arising from the pension assessment by Dr. J.A. Richie, dated May 25, 1984, states:

"I could not detect any grinding or grating in the ankle joint. In the prone position when we attempted to palpate it, again he resisted. There was no evidence of any muscle contracture. The foot arches were well preserved. The medial side of the ankle appeared to be quite normal. I found it difficult to relate his report of the ankle giving out on him, yet the joint appeared to be quite stable."

Conclusion

I would suggest a 5% award and I also recommended he stop going to physiotherapy as this is obviously overdone..."

These reports differ from the opinions given by the worker's family doctor. In a report dated March 15, 1984, Dr. Modiselle states:

"He still has some tenderness of the lateral malleolus especially on inversion of the foot. He is unable to stand or walk for prolonged periods. While physical rehabilitation has been encouraged so that he can once again become self-sufficient, I am of the opinion that this process should be a gradual one consisting of, say half a day of vocational work and half a day of physiotherapy for a few weeks. This can then gradually upgrade until he reaches his full potential of eight hours of work, depending on his progress."

It is the Panel's conclusion after a review of the evidence on this issue, that at the time the worker's rehabilitation file was closed in May, 1984, the Vocational Rehabilitation Department had reasonable grounds to conclude that the worker was not totally disabled, particularly in light of the reports of specialists. Although the specialists' reports are the result of examinations performed in the summer of 1983, there is no evidence that the worker experienced a deterioration of his condition after his examination by the specialists.

The rehabilitation closure report is very detailed and contains a number of examples of the worker's failure to cooperate with the assessment program. In all the circumstances, this Panel is satisfied that the Board had good reason to close the worker's rehabilitation file. In light of Dr. Richie's comments and those of the orthopaedic surgeons who examined him in the preceding year, there was no evidence of a need for a continuing medical rehabilitation program. The evidence indicates that the worker was capable of modified employment as far back as October, 1983, and that he could perform modified employment without the need for a specific medical program to assist him in getting back to work. We therefore conclude that the Board was justified in terminating the Vocational Rehabilitation program and that, in the circumstances, the worker cannot be said to have been co-operating with a Board - with medical or vocational rehabilitation program.

Was the Worker Available or Did He Accept Employment Which is Available and Which in the Opinion of the Board is Suitable for His Capabilities?

The worker was questioned about his efforts to find employment after June, 1984. In the five page job search list provided to the Panel is a list of firms contacted during the period May to October, 1985. Since we have already concluded that the worker is not, in any event entitled to a pension supplement after May, 1985, the worker's job search list does not cover the relevant period of time.

When questioned as to his job search activities during the period June, 1984, to May, 1985, the worker testified that he would look on occasion for employment, but primarily the jobs he looked for involved shipping and receiving or fork lift truck operation and that he did not believe he could perform these jobs if one had been offered to him. He indicated that it was not really until May or June of 1985, when he believed he was able to return to his pre-accident employment, that he seriously looked for work.

In response to questioning, the worker confirmed that he considered himself totally disabled for at least the balance of 1984 and, in effect, to the extent he looked for work prior to May, 1985, he was looking for work he knew he could not do.

We are not satisfied that the worker in this particular case made himself available for modified employment. To look for work which one knows one cannot do does not, in our view, constitute evidence of being available for work. We are not satisfied that the worker made himself available for modified employment between June, 1984, and September, 1985. The worker's education, and employment history, would suggest that he was capable of performing a range of modified employment jobs.

However, the fact that a worker has failed to make himself available for modified employment does not necessarily disentitle the worker from meeting the requirements of "available work" pensions of the pension supplement section. This Tribunal has considered almost identical finding in a decision on partial disability benefits under section 41(1)(b) of the pre-1985 Act.

In Interim Decision No. 2, a Panel of the Appeals Tribunal considered a situation in which a worker who claimed to be totally disabled in fact was found to be only partially disabled for a period of time. The Panel concluded that the worker had not made herself available for suitable employment. However the Panel noted that the words of section 41(1)(b) are "...available for employment which is available". This raised the issue of whether it must be shown that there was suitable work available for the worker, even if the worker was not available. This issue has not yet been decided by the Decision No. 2 Hearing Panel. The matter will be dealt with by the Decision No. 2 Hearing Panel at a continuation hearing on July 15, 1986.

Accordingly, the outcome of this appeal with respect to the period June 5, 1984 to May, 1985, is reserved pending a final decision from the Decision No. 2 Hearing Panel. When the Decision No. 2 Hearing Panel has rendered a final decision, a copy of the decision will be forwarded to the parties who will be given an opportunity to make written submissions prior to the final disposition of this appeal.

DECISION

1. This Panel finds that from May, 1985, to September, 1985, the worker's impairment of earnings capacity was not significantly greater than usual for the nature and degree of his injury. The worker's request for pension supplement for this period of time is therefore denied.

2. This Panel further finds that from June 5, 1984 to May, 1985, the worker was not available for suitable work. However, a decision as to the effect of this finding in the worker's entitlement to a pension supplement is reserved pending a final decision from the Decision No. 2 Hearing Panel in the issue of availability-of-work.

DATED at Toronto this 23rd day of June, 1986.

SIGNED: J. Thomas, D. Jago, L. Heard.

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Workers' Compensation Appeals Tribunal

DECISION NO. 38

Tribunal d'appel des accidents du travail

Panel Chairman: J.M. Magwood

Member: D. Jago

Member: B. Cook



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 38

THE APPEAL PROCEDURE:

The worker appeals the May 30, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, N. Holsmer.

The appeal was heard at Toronto on January 29, 1986, by a Panel of the Appeals Tribunal consisting of J.M. Magwood, Panel Chairman, D. Jago, a member of the Tribunal representative of employers and B. Cook, a member of the Tribunal representative of workers.

The worker was not represented and appeared on his own behalf. The employer was not represented although it was notified of this hearing and received a copy of the Case Description in advance. The worker advised the Tribunal that he had received and had read the Case Description. V. Cabral appeared on the behalf of Tribunal Counsel Office.

The Panel heard and considered evidence given under oath by the worker in oral testimony and also heard the oral testimony of a co-employee of the appellant worker who had been employed for many years doing the same type of work in the same garage.

The Panel read the Case Description recital of the facts prepared by the Tribunal Counsel Office. Neither the worker nor the employer, previously provided with this document, had made submissions with respect to it.

THE ISSUE AND HOW IT ARISES:

The worker has been and continues to be employed since 1974 as a class A motor mechanic, with diesel endorsement in a garage operated by the employer, where his work was mainly on tractors and trailers, doing some electrical and welding work as well. A great deal of heavy manual lifting is involved, much of it performed in awkward positions, working on his knees or in a squat position, pulling wheels off trucks, lifting heavy weights up to 80 lbs., and assisting a hydraulic jack in pulling and positioning transmissions weighing very much more. While a hydraulic jack was used when required, and assistance was available from co-workers on occasion, this was not always available or practical.

On January 27, 1983, the worker suffered a low back injury as a result of a fall down some metal steps into a grease pit at work. He was off work for two weeks as a result of this injury and received temporary total benefits for the lost time.

Following his return to work in February, the worker was given light duty assignments involving no heavy lifting. He performed light work for almost six weeks, gradually taking on heavier work. The worker informed the Panel that he was performing his regular job by the end of March or early April, 1983.

At some time following the return to work, the worker began to experience pain which he has described as a slight burning sensation in his left groin area.

At the hearing, the appellant clarified that the discomfort in his groin began about one week after his return to normal duties in late March or early April.

About four months after the onset of problems, the worker mentioned his pain to his supervisor, who advised the worker that it was likely a hernia. This ultimately proved to be correct.

There is no record of the worker seeking medical attention for his hernia condition until April 26, 1984. Although the worker advised that he did mention the matter to his doctor before this, he acknowledged at the hearing that there is no evidence of this. The WCB investigator reported that both Dr. Kapusta, the family physician, and Dr. Alexander, the surgeon who performed the operation, explained to the worker that a hernia "can be a gradual thing from the heavy nature of work performed. That is, gradually ripping, each time he lifts until the condition develops into a hernia."

On June 29, 1984, the worker stopped work and was admitted to the Shouldice Hospital for repair of the hernia which was done on July 4, 1984. The worker returned to work on September 4, 1984.

His claim for benefits was denied by the Board up to and including the Appeals Adjudicator level, on the grounds that there was no causal relationships between the hernia and the employment.

THE PANEL'S REASONING:

There is no dispute that the worker suffered a hernia which was surgically repaired and which legitimately required him to be off work for the period June 29 to September 4, 1984. The question is whether the disability arose out of and in the course of employment.

The Board's adjudication of this matter has evidently been based on the Board's Policies with respect to entitlement for hernia repair. This policy indicates that there must be a specific, work related incident with an immediate onset of symptoms. This policy was considered by this Tribunal in Decision No. 26 which indicated that cases which fail to meet the internal guidelines should be examined to determine whether or not they are compensable under the Act.

This Tribunal has a duty, pursuant to Section 80(1) and Section 86(m) of the Act, to reach a decision on the merits and justice of the case.

In this case the worker has been unable to relate the onset of his hernia to a specific incident.

The report of the WCB investigator confirms statements by the Director of Loss Control and the Director of Maintenance in the employer's Garage and the Garage Foreman of the employer Company during the relevant period of time concerning the nature of the worker's heavy work performed from awkward positions, squatting or on his knees, and the Maintenance Director added in his statement to the WCB investigator that "the injured worker is a good employee, trustworthy, and not one to obtain benefits to which he is not entitled". All of the foregoing facts were repeated under oath to the Tribunal by the appellant worker and also by his co-worker for many years, who is fully conversant with the nature of the employment. We were favorably impressed with the evidence given by each and unhesitantly accept their testimony.

The appellant gave evidence that he was not employed elsewhere, either during his convalescence from the 1983 accident resulting in a back injury, or while convalescing from the hernia operation. He stated that he was not engaged in heavy household tasks, such as shovelling snow, as he had two strong sons at home who undertook such duties.

The Panel accepts the worker's evidence that the pain first developed shortly after returning to his regular duties in March and April rather than while he was performing light duties following his return to work from the compensable back accident of January 31, 1983.

We find, on a balance of probabilities, that there is a causal relationship between the worker's hernia condition and his employment. We are not sure, and do not believe that it would be possible to determine, whether the problem originated with the January 27, 1983, incident and was aggravated by the return to heavy work in March or April or if it came about as a result of the nature of the worker's heavy normal duties. We do not believe that, in this case, it is a relevant concern, noting that the employer would be the same and that in either case the hernia would be work related.

DECISION:

The appeal is allowed. The Panel finds that on balance of probabilities, the worker's diagnosed hernia condition was causally related to his employment. The lost time from June 29, 1984, to September 3, 1984, is, therefore, compensable.

This Panel leaves to the Board the determination of such compensation.

DATED at Toronto this 25th day of April, 1986.

SIGNED: J.M. Magwood, D. Jago, B. Cook

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Workers' Compensation Appeals Tribunal

DECISION NO. 41

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: D. Jago

Member: S. Fox



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

INTERIM DECISION # 41

THE APPEAL PROCEDURE:

The worker appeals the May 1, 1985, decision of the Worker's Compensation Board Appeals Adjudicator, G.R. Linklater, denying entitlement for a heart condition.

The appeal was heard on January 24, 1986, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, D. Jago, a member of the Tribunal representative of employers, and S. Fox, a member of the Tribunal representative of workers.

The worker attended and was represented by Mr. S. O'Ryan, Business Manager from the worker's union, and by Mr. Griffiths, a business representative from the same union. Mr. Honsberger was present as an observer from the employer. Ms. Patricia Auron appeared as the Tribunal's counsel.

The Panel heard and considered evidence given under oath by the worker in oral testimony and read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials.

The Panel also read the Case Description recital of facts prepared by the Tribunal's Counsel Office. The Case Description was marked as Exhibit "1" at the hearing. Submissions were made by the worker's representative and by Tribunal counsel.

THE ISSUE AND HOW IT ARISES:

On the morning of March 8, 1984, the worker was standing near the top of a ladder approximately 20 feet off the ground, drilling holes into the wall, when the ladder was jerked out from under him. As he fell, he managed to grab onto a window sill and climb through a window which had been broken by the ladder as it fell.

As soon as he climbed inside the window he started to shake violently and uncontrollably. He noticed that his arm was bleeding and his jacket was cut from the window glass.

Sometime later that morning, after the shaking subsided, the worker returned to the job site and climbed to the roof. While on the roof he experienced breathlessness, a condition he had never had before. Throughout the morning he continued to experience breathlessness and a sharp pain in the upper portion of his chest. After lunch, he continued to work on the roof and again experienced pain in his upper chest. He concluded that he was suffering from frostbite in his lungs because the day in question was very cold and windy.

He also felt a soreness or stretching in his left side which he felt occurred when he grabbed the drill when he fell. He believed he strained his muscles on the left side. The pain from the muscle strain went up into the back of the neck and down the left side of the chest through to the shoulder blade.

The worker returned to work the next day and continued to experience pain across the chest and on the left side. Over the next week the worker continued to work on jobs that were generally lighter work but continued to experience chest and side pains whenever he had to do any form of strenuous work. On Friday, March 16, 1984, he made an appointment with his doctor for March 20, 1984.

His family doctor confirmed muscle damage on the left side and because of angina-like symptoms, he sent the worker for X-rays, stress tests and cardiograms. On his doctor's advice he stopped working on March 20.

On March 29 his family doctor diagnosed high blood pressure and prescribed Brocadren for this condition.

Throughout this period of time the worker continued to experience chest pains and soreness from the muscle strain.

During the night of March 31 the worker experienced chest pain going down into the centre of his chest. He went to his family doctor the next morning. The results of a cardiogram were negative.

On April 16 he visited a cardiologist on referral from his family doctor. He was again given a cardiogram and was advised by the cardiologist that "he had had a heart attack" at some point after the cardiogram of March 31, 1984.

The worker indicated that after he started taking Brocadren he became very weak and felt that his condition was deteriorating. He felt under a great deal of stress because he did not know what was wrong with him. He said his medical condition continued to deteriorate until early May when he was placed on different medication.

Because his muscle strain problems had failed to resolve themselves during April and May, on the advice of his cardiologist he commenced physiotherapy in late June. He was treated by a chiropractor for his muscle strain condition three times a week until the end of November and two times a week until the end of December, 1984, at which time the chiropractor treatment was terminated.

The worker indicated to the Panel that the chiropractor treatment helped a great deal. A numbness he had been experiencing in his left arm cleared by the end of January, 1985. He testified that his left hand has now healed to the point that he could return to the plumbing trade today, although he would still favour his right side.

The WCB file indicates that entitlement for muscle strain was recognized by the Board and benefits for this condition were paid until April 23, 1984.

With respect to his heart condition, the worker indicated that since he has been under the treatment of his cardiologist he is able to keep his angina condition under control through medication. He has not had a recurrence of the symptoms he described on March 31, 1984, and he is now able to resume some activities although he still suffers from occasional breathlessness. He has not been able to return to work since the incident.

The issues on appeal to this Panel are entitlement for ongoing muscle strain after April 23, 1984 and ongoing entitlement for a heart condition.

THE PANEL'S REASONING:

During the course of the hearing the worker was questioned by Mr. O'Ryan, by Ms. Auron, and by Panel members. The Panel finds the worker to be a credible witness and accepts his evidence. The Panel concludes that the worker did indeed experience the muscle and heart symptoms in the way he related them to the Panel.

At the outset of the hearing, Mr. O'Ryan advised the Panel that the worker's entitlement to benefits arose in two separate and distinct ways. He submitted that the muscle condition and the heart problem were two separate disabling conditions which continued to exist after benefits were terminated on April 23, 1984.

Noting that the Appeals Adjudicator decision primarily addressed the heart condition, the Panel questioned its jurisdiction to deal with the muscle strain issue. The worker advised the Panel that the muscle strain problem had indeed been raised at the Appeals Adjudicator hearing. This would appear to be confirmed by the first paragraph of the Appeals Adjudicator decision. We are satisfied that the issue was before the Appeals Adjudicator notwithstanding his apparent failure to draw any conclusions with respect to ongoing entitlement arising from the muscle strain problem. In the future, it would be preferable for WCB Hearings Officers, wherever possible, to state their findings on material issues raised at their hearings to ensure that such issues have been dealt with in the Board's final decision.

With respect to the heart condition this Panel is unable to conclude on the material before it whether there exists a relationship between the worker's ongoing angina condition and the incident of March 8, 1984. The Panel has directed the Tribunal Counsel Office to obtain more medical information which will be shared with the parties prior to a final determination on this issue.

However, on the issue of continuing benefits beyond April 23, 1984, for the muscle strain condition, this Panel concludes that the worker continued to be totally disabled after April 23, 1984, because of the pain he was experiencing from his muscle strain condition. We reach this conclusion for the following reasons.

The Board's decision to terminate benefits on April 23, 1984, resulted from a conversation in May, 1984, between the Board and the family doctor, during which conversation the doctor gave an opinion that the worker would require a month off for strained chest muscles.

There is no indication that as of April 23, 1984, the worker had been examined for his muscle strain problem and an opinion rendered as a result thereof as to the worker's ability to return to work. Thus, the Board's decision is based on no more than an estimate as to what the condition would be a month hence.

Medical reports after April 23, 1984, lead us to the conclusion that the worker continued to suffer substantial pain from the muscle strain for a period of time after April 23 and that this pain was significant enough to prevent the worker from returning to the workplace, quite apart from his heart condition.

The cardiologist's reports of May 10, May 23, June 11, and June 26, 1984, all make reference to ongoing musculoskeletal pain. As of June 26, 1984, the cardiologist reports that the worker "seems to complain predominantly of musculoskeletal pain".

His family doctor on July 10 stated:

"considering the initial injury and accident and the symptoms, it appears that a musculoskeletal chest muscle strain resulted. He also did eventually develop a myocardial infarct and still seems to have angina. (The cardiologist) has done stress tests but still is not certain how much of the pain comes from either source. He feels that the musculoskeletal pain is improving (comments on June 11, 1984, visit)."

Reports from the worker's chiropractor also support continued disability after April 23 on account of musculoskeletal problems. Status reports dated July 13 and July 31 describe continuing chest wall pain. The chiropractor, on September 17, 1984 states:

"It is my considered opinion that if (the worker) had absolutely no cardiac problem, he would be unable to work from June 27 (the first date at which the worker consulted the chiropractor) until the time of this writing while under treatment with me."

In our opinion, the medical reports taken together with the worker's oral evidence about continuing disability caused by his chest muscle problems establish entitlement to benefits beyond April 23, 1984. The April 23rd date was arrived at by applying an estimated lay-off period of one month. Subsequent medical reports indicate that this estimate proved incorrect.

A careful review of the Board's file leads us to conclude that the Board directed all of its attention to the heart condition and failed to fully address the muscle strain condition. This emphasis is borne out by the Appeals Adjudicator decision which merely refers to the worker's claim for ongoing muscle strain entitlement and does not deal with the claim in coming to a conclusion. We could not find any WCB opinions or comments in the Board file after May 4, 1984, on the issue of ongoing muscle strain entitlement.

DECISION:

We allow this appeal as it relates to the issue of ongoing entitlement for chest muscle strain and we order that benefits be paid to the worker until the conclusion of treatments by his chiropractor at the end of December, 1984, at which time the worker indicated that the numbness in his hand ceased. We conclude on the evidence before us that by the end of December, his muscle strain problem had improved to the point that he could again return to work were it not for his heart condition.

DATED at Toronto this 1st day of April, 1986

SIGNED: J. Thomas, D. Jago, S. Fox

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Workers' Compensation Appeals Tribunal

DECISION NO. 43

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: D. Jago

Member: N. McCombie



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 43

THE APPEAL PROCEDURE:

The worker appeals the May 22, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, Mr. V.W. Ferguson.

The appeal was heard on January 31, 1986, by a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, D. Jago, a member of the Tribunal representative of employers, and N. McCombie, a member of the Tribunal representative of workers.

The worker appeared and was represented by Mr. H. Sanders of the Office of the WCB Workers' Adviser. An interpreter was present to assist the worker. The employer had received notice of the hearing but decided not to appear. Mr. R. Nairn appeared on behalf of the Tribunal's Counsel Office.

The Panel heard and considered evidence given under oath by the worker in oral testimony and read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials.

The Panel also read the Case Description recital of the facts prepared by the Tribunal's Counsel Office. The worker's representative received the Case Description prior to the hearing and had an opportunity to make submissions on it.

THE ISSUE AND HOW IT ARISES

This appeal arises from an incident at work on October 21, 1983. The worker, who was employed as a cleaner, felt a sharp pain in his right groin while lifting a 5 gallon pail of liquid soap which weighed approximately 30 lbs. The following day the worker saw his family doctor, Dr. Ciurria, who diagnosed a pulled muscle in the right groin.

In his report of accident to the WCB, the worker reported an accident and an injury to right groin only. The worker received entitlement to WCB compensation for the right groin condition.

In his progress report to WCB dated December 30, 1983, the family doctor, Dr. Ciurria, wrote "No detectable problems. Patient now complains of testicular pain, but no abnormality detected". A medical examination in January, 1984, by Dr. W.C. Forder, a urologist, indicated that the testicular pain was the result of right orchitis. The medical reports indicated that the worker had had surgery for a similar problem 5 to 6 years earlier and a cystoscopy indicated a re-growth of prostatic tissue. Surgery to correct this prostate condition was carried out on January 6, 1984.

The WCB considered the prostate condition to be non-compensable. On January 24, 1984, the worker's compensation for the injury to his right groin was terminated. The WCB Claims Adjudicator stated in a letter that it was the Board's opinion that the worker's compensable condition was resolved and any further time off work was due to the non-compensable prostate condition.

The worker continued to complain of pain in his right leg, radiating to his groin and testicle. Dr. Ciurria referred him to an orthopaedic specialist, Dr. T.W. Barrington, who saw the worker in April, 1984. Dr. Barrington reported: "He is complaining still of discomfort about his right testicle and in his groin and leg. He does not complain of back pain". The doctor noted that x-rays showed degenerative changes at all of the inter-vertebral discs between L2 and L4 (lumbar spine).

Dr. Forder, who treated the worker for his prostate condition, reported that he could return to work in April, 1984.

In November, 1984, the medical reports note that the worker began to complain of back pain with radiation of pain into his right leg. He was examined by Dr. E. Transfeldt in the Department of Orthopaedics at St. Michael's Hospital. On November 11, 1984, Dr. Transfeldt reported to Dr. Ciurria that the worker related his back pain to the October, 1983, accident. X-rays showed "diffuse degenerative change involving the entire lumbar spine... There is decrease in disc space at (the lower 3 mobile segments)".

The worker then claimed entitlement from WCB for a low back disability and claimed that the disability resulted from his October 21, 1983, accident. A report dated January 25, 1985, from Dr. Ciurria was submitted to the Appeals Adjudicator. The report stated that the worker's complaints of pain in his right buttock, groin and thigh were consistent from the date of the accident and that, prior to the accident, the worker did not complain about these areas. Dr. Ciurria wrote that, "I think he has a permanent partial disability involving his right lower back and groin area...."

On September 20, 1985, Dr. Ciurria wrote a further report to the worker's representative in anticipation of the hearing before this Tribunal. Dr. Ciurria gave his opinion that the pain in the worker's right groin in October, 1983, was "great enough (to) mask whatever pain was present in his back".

During the hearing on January 31, 1986, the question was raised about earlier injuries contributing to the worker's back problem. The evidence indicated that prior to the 1983 accident, the worker had an accident in February, 1977, in which he injured his neck and shoulder. That earlier accident resulted in a 10% permanent disability pension. There was also a decision of the Claims Review Branch, dated April 13, 1982, which denied entitlement for a low back disability arising from his 1977 accident. In that decision, the WCB noted that the worker complained of pain in his lower lumbar spine in September, 1977, which he related to the February, 1977, accident. At the hearing on January 31, 1986, the worker gave oral evidence and stated categorically that he had never experienced pain in his lower back before the October, 1983, accident. He denied making a claim to WCB for a low back disability prior to 1983. The worker stated that his only complaints following the 1977 accident were with his neck, shoulder and ribs.

Further, there is a report in the materials before the Panel from Dr. J.A. Ritchie, a surgical consultant with WCB, dated August 25, 1978. Dr. Ritchie noted that the worker complained of pain in his neck, in his lower back, and down his legs. Following his examination of the worker, Dr. Ritchie stated that the worker had some restricted movement at the lower back and some tenderness in the lumbo-sacral area, but stated that there was no entitlement for his low back problem.

The record also contained a report from Dr. E. Simmons, a specialist in orthopaedics, dated January 11, 1978. Dr. Simmons stated: "He is now having some complaint related to his thoracolumbar spine where he has some degenerative change of the thoracic region with an increased lumbar lordosis".

Dr. Simmons saw the worker again in 1980 and reported on February 21, 1980: "This man still claims rather diffuse discomfort related to his thoracolumbar spine, and to a lesser degree, his neck".

At the hearing, the worker denied having any problems with his low back when he saw Dr. Ritchie or Dr. Simmons. He attributed Dr. Ritchie's comment about back pain to the fact that no interpreter was present during the examination. The worker also gave evidence at the hearing that he complained of back pain to Dr. Ciurria from the time of the accident in October, 1983, and that he also complained of back pain to Dr. Barrington in April, 1984. He did not know why these doctors failed to mention his back problems in their reports.

The worker's representative contended at the hearing that the worker did injure his back in the 1983 accident, but that the pain in his right groin masked the back problem. Mr. Sanders argued that the back problem was neglected until after the worker recovered from his prostate surgery, and that the back problems are well documented after April, 1984. Mr. Sanders submitted that the worker's symptoms prior to the 1983 accident were in the upper and mid part of the worker's back, not in the low back area. He noted that the worker has not been able to return to work since 1983 as a result of his disability.

The Appeals Adjudicator found that the medical evidence did not indicate any injury or aggravation to the worker's low back in October, 1983, and concluded that the subsequent low back problems were not related to the incident on October 21, 1983.

The issue for this panel, therefore, is whether the accident of October 21, 1983, resulted in the worker being temporarily totally disabled after January 24, 1984, in accordance with section 39 of the Worker's Compensation Act then in effect which states:

S.39 "Where temporary total disability results from the injury, the compensation shall be a weekly payment of 75% of the worker's average weekly earnings, and is payable so long as the disability lasts".

THE PANEL'S REASONING:

There is no dispute that the worker was injured in an accident at work on October 21, 1983. He received temporary total disability compensation for the injury to his right groin until January 24, 1984, when benefits were terminated.

The question for this Panel is whether the worker also injured his low back in the October, 1983, accident and was disabled after January, 1984, as a result. The worker's representative asked the Panel to accept Dr. Ciurria's reports of January, 1985, and September, 1985, as evidence that the worker did in fact suffer a low back injury in October, 1983. Dr. Ciurria stated that the pain the worker experienced in his right groin could have masked any pain in his back. Dr. Ciurria also reported that the worker did not complain of back pain prior to the accident in October, 1983.

With regard to Dr. Ciurria's statement that the pain in the worker's right groin could have masked any back pain, the Panel notes that Dr. Ciurria's progress report of December 30, 1983, stated that there were "no detectable problems" in relation to the right groin. The only other pain noted at that time was testicular pain. The Panel interprets the doctor's statement to mean that the pain from the right groin had subsided. No mention of back pain is recorded in the medical reports until November, 1984, about 11 months after the accident. Therefore, the Panel is unable to accept Dr. Ciurria's statement that the other problems masked the back pain.

With regard to Dr. Ciurria's statement that the worker had not complained of back pain prior to the October, 1983 accident, the Panel finds that there is substantial evidence on record which indicates that the worker did have low back problems prior to the 1983 accident. In particular, the Panel notes the reports of Dr. Ritchie and Dr. Simmons which referred to non-compensable low back problems in 1978 and 1980. The Panel also had regard for the 1982 Claims Review Branch decision of the WCB denying a claim by the worker for a low back disability.

Having reviewed all the medical evidence on file and having regard for the worker's evidence which was not consistent on this point, the Panel concludes that the worker did have low back problems prior to the accident in 1983 which were not work related. The Panel notes the 1984 medical reports and x-ray reports of degeneration in the low back area and concludes that any disability the worker has in his low back is not related to the 1983 accident.

DECISION:

The appeal is denied. The worker is not entitled to temporary disability compensation after January 24, 1984.

Dated at Toronto, this 14th day of March, 1986.

Signed: L. Bradbury, D. Jago, N. McCombie



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

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DECISION NO. 44

Panel Chairman: J. Thomas

Member: K. Preston

Member: N. McCombie



June 1986

RESEARCH AND PUBLICATIONS DEPARTMENT
Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 44

THE APPEALS PROCEDURE

This is an appeal by the worker from the March 13, 1985, decision of the Workers' Compensation Board Appeals Adjudicator F. Kaliciak.

The appeal was heard on January 30, 1986, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, K. Preston, a Tribunal member representative of employers, and N. McCombie, a Tribunal member representative of workers.

The worker appeared and was represented by J. Herbert of Union Consulting Services. The employer appeared and was represented by Mr. Carson, Assistant General Claims Agent for the employer. The Tribunal was assisted by A. Godin, from the Tribunal's Counsel Office.

The Panel read the relevant forms, memoranda, and reports extracted from the WCB file and collected in the Case Description Materials. The Panel also heard evidence given by the worker and a witness called on behalf of the worker in oral testimony. Submissions were made by the worker's representative, the employer representative, and by Tribunal counsel.

THE ISSUE AND HOW IT ARISES

The worker was employed as a Passenger Service Director (Senior Flight Attendant) with the employer airline company. Although there is some confusion about dates, it would appear that on Tuesday, January 25, 1984, she left Toronto and worked an overnight flight to Amsterdam. She was required to layover in Amsterdam for several days while awaiting a return flight to Toronto. With the rest of the crew, she checked into a hotel upon her arrival in Amsterdam in the morning of January 26, 1984. She slept during the afternoon. That evening, she and another flight attendant left the hotel at about 8:00 p.m. (which would have been approximately 2:00 p.m. Toronto time) and walked to a cafe where they stayed for approximately an hour. They then walked to a restaurant which, according to the worker, is approximately a fifteen minute walk from the hotel. They dined in the restaurant and socialized with the owners of the restaurant until approximately 1:30 a.m. (in the early morning of January 27, 1984). After leaving the restaurant, they walked along a pedestrian street in the centre of Amsterdam, heading towards a cafe where they intended to meet other crew members to have coffee and after dinner drinks. The cafe was owned and operated by a friend of the worker and her friend's husband. Her friend also worked for the accident employer. The cafe owners lived above the cafe at that time. The worker testified that a lot of crew members go to that particular cafe after meals and she went there to meet other members of the crew and to visit with her friend - cafe owner.

While proceeding along the pedestrian street the worker's purse was snatched from her. This incident occurred approximately 10 minutes after the worker had left the restaurant. The worker ran after the man who snatched her purse and shortly thereafter the worker was accosted by two or three other men who jumped out from a side street, grabbed her by the head, and bashed her into a store window. She suffered a concussion.

With the assistance of her friend, she managed to get back to the hotel and promptly reported the matter to the police. She indicated that she felt nauseated and faint for the entire next day and although she was able to work the return flight to Toronto, she sought medical attention upon her return and on her doctor's advice she was off work for two weeks thereafter.

The worker claims entitlement to compensation for the lost time caused by her concussion. The issue, therefore, is whether her accident arose out of and in the course of her employment.

Mr. Herbert, on behalf of the worker, asks this Panel to interpret the phrase "arising out of and in the course of employment" in the overall context of the particular job performed by the worker. As we understand Mr. Herbert's argument, the layover is part of the normal duties of a flight attendant or a Passenger Service Director. The worker testified that she normally lays over at least 80 days a year in other cities. By the terms of her collective agreement, she is remunerated while on layover in that she is paid one hour for every four hours of layover. The company selects and pays for hotel accommodation for the entire crew. The worker testified that while on layover, she must be available at anytime for reassignment purposes. However, the worker indicated that she was not required at all times to keep the employer informed as to her whereabouts.

As Passenger Flight Director, the worker testified that she has certain unique responsibilities to assemble a crew if a reassignment is required by the company. There are restrictions imposed on her while on layover, in that she cannot travel freely overnight. In particular, she requires the permission of the company before leaving Toronto if she wishes to stay with a family or friend in the layover city and she indicated that permission could be denied to stay with a family or friend who did not reside in the layover city. She advised that twelve hours before the return flight, she must refrain from alcoholic beverages. She believed that on layover, she would be subject to discipline. Moreover, she told the Panel that the crew are not required to remain at all times in the hotel. They can go shopping and sightseeing. This is a common practice to which the company has not objected. She stated that crew members are not required to eat in the hotel. They are given a meal allowance which, she testified, was insufficient to enable her to eat in the relatively expensive hotel restaurant. Crew members are under no obligation to report to the Captain of the crew or the Hotel Manager as to their whereabouts if they left the hotel. The worker could not specifically recall whether, on the evening in question, she reported her whereabouts to the Captain or the manager of the hotel.

It was Mr. Herbert's submission that on a layover, a worker is almost always on duty unless there is a distinct departure from company procedures or the employee's conduct clearly takes her outside the employment relationship. His alternative argument, in the event this Panel were not to accept the proposition that a worker is almost always on duty while on layover is that at the time of this particular incident, she was in the course of her meal in that she was travelling from the restaurant to the cafe for coffee.

Mr. Carson, on behalf of the employer, indicated that the employer was not disputing whether the incident happened, nor was the employer disputing the fact that the accident arose out of the employment, in that it occurred while the worker was on layover. Mr. Carson argued that, although section 3(2) of the pre-April 1, 1985 Act establishes a presumption that where an accident arose out of

the employment, it is presumed to have occurred in the course of the employment, the presumption clause includes the phrase "unless the contrary is shown". It was Mr. Carson's submission that the worker's conduct after leaving the restaurant took her out of the course of her employment. In support of his position, he referred to the fact that for a period of five hours or more during that evening she was unavailable to the employer. More importantly, after leaving the restaurant, she embarked on an activity for her own personal reasons and enjoyment. His further submission was that the worker's conduct after leaving the restaurant was unnecessarily perilous and was conduct over which the employer had no control and could not have anticipated.

THE PANEL'S REASONING

One of the Hearing Panel members is unable to concur in the Panel's decision. Accordingly, what follows is the reasoning of the majority of the Panel.

Section 3(1) of the pre-1985 Act sets out the statutory requirement for establishing entitlement to Workers' Compensation benefits:

"3(1) Where in any employment, to which this part applies, personal injury by accident arising out of and in the course of the employment is caused to a worker, his employer is liable to provide or to pay compensation in the manner and to the extent herein after mentioned, except where the injury

- (a) does not disable the worker beyond the day of accident from earning full wages at the work which he was employed; or
- (b) is attributable solely to the serious and wilful misconduct of the worker unless the injury results in death or serious disablement."

In considering whether an accident arose out of and in the course of the employment, the following presumption applies:

"3(2) Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment and, where the accident occurred in the course of the employment, unless the contrary is shown, it shall be presumed that it arose out of the employment."

In this case, there is no dispute that the worker was involved in an accident as defined by the Act nor is it disputed that she suffered a personal injury as a result of the accident. The issue is whether the accident arose out of and in the course of the employment.

For an accident to arise out of the employment, there must be something about the employment which can be said to have caused the accident to occur. It must be established that the accident resulted from the employment. During the course of the hearing, the Panel was referred to some cases decided in non-Ontario jurisdictions to assist the Panel in formulating the principles to be applied in determining whether an accident arose out of and in the course of employment. The

cases indicate that often the employee's conduct is examined in order to assess whether the accident was the worker's fault. In other words, was the accident caused by the employment or by the worker?

In considering the importance of the employee's conduct in determining the cause of an accident, it must be noted that the Ontario Workers' Compensation Act has already established the level of worker misconduct which will disentitle the worker from compensation benefits. That level is "serious and wilful". It is one of the exceptions contained in section 3(1) of the old Act. In our view, unless the employee's conduct constitutes serious and wilful misconduct, it would be incorrect to conclude that a lesser degree of misconduct could disentitle the worker by virtue of a finding that the employee's conduct, and not the employment, caused the accident.

In this case, the worker was injured while on a layover in a foreign city. Because of the time differences between Amsterdam and Toronto, the worker found that she needed to remain awake until the early hours of the next morning in order to adjust her "internal clock" to match Amsterdam time. As a result, she ended up on the streets of Amsterdam late at night. Thus, the layover nature of her employment gave rise to the circumstances that substantially caused her injury. Were it not for the layover, it is unlikely that the worker would have suffered the injury.

Moreover, there was nothing about the worker's conduct to constitute serious and wilful misconduct. She testified that her decision to run after the purse-snatcher was purely a reaction to a crisis situation. It wasn't a situation which she arrived at after a great deal of thought. In hindsight, she may well regret responding to her instincts. However, this is far from serious and wilful misconduct. It was, at worst, an error in judgement. We therefore conclude that the accident arose out of the employment.

Once a determination has been made that an accident arose out of the employment, the application of section 3(2) of the old Act raises a presumption that the accident occurred in the course of the employment. The presumption is rebuttable. That is, where a finding has been made that the accident arose out of the employment it is possible to demonstrate that the accident did not occur in the course of the employment. The presumption clause assists the worker in that, having established that the accident arose out of the employment, it will follow that the accident arose in the course of the employment unless it is established that the worker was not in the course of employment when the accident occurred. The onus shifts to the person or party opposing the claim to demonstrate that the accident did not arise in the course of the employment.

A worker is in the course of her employment when she is doing work for her employer, or performing a duty for her employer, or doing something reasonably incidental to her employment. In this case, in order to rebut the presumption that the accident arose in the course of employment, it must be established that the worker was not doing work for her employer or performing a duty for her employer or doing something reasonably incidental thereto when the accident occurred.

In the case of travelling employees, it is often difficult to decide what acts of the employee are purely personal and what acts can be reasonably related to fulfilling the duties of her employment. This Hearing Panel was referred to a number of decisions, including many American ones, describing various tests that

courts have applied in the case of travelling employees to determine whether a worker was in the course of employment when an accident occurred. A test adopted in a number of cases is the "distinct departure" test. It has sometimes been stated as follows:

"Employees whose work entails travelling away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable."

Other cases have referred to a "reasonable activity" test which has been described as follows:

"Where an employee, as part of his duties, is directed to remain in a particular place or locality until directed otherwise or for a specified length of time the rule applied is simply that the employee is not expected to wait immobile, but may indulge in any reasonable activity at that place, and if he does so the risk inherent in such activity is an incident of his employment....The test as to whether specific activities are considered to be within the scope of employment or purely personal activities is the reasonableness of such activities. Such an employee may satisfy physical needs during relaxation."

What the tests indicate is that something specific, such as a distinct departure on a personal errand or indulging in an unreasonable personal activity is required to take the employee out of the course of his/her employment. The onus is on the employer to establish the distinct departure and no objection was taken by Mr. Carson to this proposition.

The Workers' Compensation Board has adopted the distinct departure test when considering travel on employer's business. Directive Number 22, dealing with travel on employer's business states:

"Where the conditions of the employment require the worker to travel away from the employer's premises, the worker is in the course of the employment continuously except when a distinct departure on a personal errand is shown. The mode of travel may be by public transportation or by employer or worker vehicle if the employment requires the use of such vehicle. However, the employment must obligate the worker to be travelling at the place and time the accident occurred."

With respect to overnight accommodation, the Board has adopted the reasonable activity test.

"Coverage also extends to accidents occurring in places such as hotels when the employer is paying the worker's expenses. The worker is covered should he suffer injury by accident at any time while in the hotel engaged in reasonable activities such as dining in the restaurant and using the washroom facilities.

Should the worker choose to dine in a restaurant other than in the hotel but within a reasonable distance of it, coverage is extended during this activity. There is no entitlement should the worker be injured while visiting a movie theatre or cocktail lounge or for some other personal activities."

The application of these tests in the context of foreign travel has been considered by Professor Ison in his book Workers' Compensation in Canada at page 20:

"Where a worker is employed to travel, an injury resulting from activities that are appropriate to maintaining oneself such as eating, sleeping, and washing is one arising out of and in the course of employment.

So too is an injury resulting from the use of hotel and restaurant premises.

If the worker goes out for a purely social evening, such as to the theatre, an injury in the course of that event would probably not be considered in the course of employment unless it was related to the employment in some other way, or the employment took the worker to a foreign location where social life involves an increased risk." (emphasis added)

In considering whether a worker's conduct while on a layover in a foreign city constitutes conduct arising out of the course of her employment, we are of the view that it is more appropriate to refer to the reasonable activity test. The distinct departure test seems to be more applicable to situations where the worker is on route to a particular destination and the issue arises as to whether the worker has deviated from the route, thereby raising the possibility of removing the worker from the course of his employment.

The reasonable activity test, on the other hand, is more suitable in those situations where the travelling employee has arrived at her destination and is required to stay at the foreign location because of her employment.

What, then, constitutes a reasonable activity? Clearly activities associated with maintaining one's existence are reasonable activities. The Board, for instance, has specified activities such as dining in the restaurant and using the washroom facilities as reasonable activities. Also included in the Board's definition of reasonable activities is dining in a restaurant within a reasonable distance of the hotel. The Board excludes from its list of reasonable activities situations such as visiting a movie theatre or cocktail lounge. In the above mentioned quotation from Professor Ison's text, reasonable activities include those which are appropriate to maintaining oneself such as eating, sleeping and washing. The use of hotel or restaurant premises is also included as a reasonable activity.

The difficulty arises in assessing activities of a more social nature. Going out for a purely social evening, according to Professor Ison, would probably not be considered in the course of employment unless it was related to the employment in some other way or the employment took the worker to a foreign location where social life involves an increased risk.

Thus, if one accepts Professor Ison's characterization of reasonable activities, one would conclude that an activity which might be regarded as a purely personal one if undertaken locally might be regarded as an activity occurring in the course of employment if it takes place in a foreign location where social life involves an increased risk. The concept of applying a different standard to activities in foreign locations has been accepted in a number of decisions. In the American decision of Young v. Henry M. Young Inc., 56AD 2d 941, the court stated:

"When the employment takes the employee far from home and excursions to nearby places are available and expected, then the employment exposes the employee to risk and an accident under such circumstances is compensable."

In another American case, Davis v. Newsweek Magazine, 110NY 2d 406 (1953), the court stated:

"When the travel is essentially part of the employment, the risk remains an incident thereof even though the employee may have turned his steps towards a place of refreshment, for the employment continues until the necessary travel is concluded ... When such travel is performed in foreign lands, where strange customs or abnormal conditions prevail, the risk involved in travelling from a place of reasonable personal diversion to the appointed place for service may also come within the coverage afforded by the employer's compensation insurance."

Thus, where the nature of the employment reasonably requires the worker to engage in activities that involve increased risk, and where the increased risk arises by virtue of being in a foreign location, the activity may be considered to have arisen in the course of employment.

In considering the situation of a layover, we have some difficulty restricting the list of reasonable activities to those directly connected with maintaining oneself in the foreign location. The worker is on layover because of her employment situation. It is her employment that determines how long she will be required to stay in the foreign location and during that time, it is reasonable to expect that not only will she be engaged in activities associated with maintaining herself but she will also engage in other social and recreational activities.

Indeed, the employer in this case has recognized the importance of a certain degree of freedom on layover by not requiring the employees to keep the Captain or the Hotel constantly informed of their whereabouts. As was stated by an airline Captain of the employer company in his testimony before the Appeals Tribunal, "If they can find me, they can have me". In our view, the employer has contemplated a range of reasonable activities in which it knows and expects its employees will be involved on layover. Otherwise, the employer would have imposed a more rigorous set of reporting procedures on its employees who lay over.

Applying these principles to the facts of this case, the worker was on the streets of Amsterdam late at night because she was attempting to adjust her internal clock to Amsterdam time. She was walking with a co-worker after leaving a restaurant and was headed towards a cafe where she intended to meet other co-workers. At the time the mugging occurred, she was within walking distance of her hotel. Although she was engaged in an activity that was largely social in

nature, the reason that she was out late at night is related to her employment in that she was attempting to adjust her internal clock in order to be available for possible reassessments the next day.

Moreover, in our view, her layover in a foreign location and the fact that she found it important to be out late at night exposed her to an increased risk. It was a risk which we conclude was reasonably within the contemplation of the employer, particularly considering the number of co-workers who engaged in similar conduct. Thus, although there was a personal aspect to the worker's activity in heading towards the cafe, we are of the opinion that, in the circumstances of this case, her conduct constituted a reasonable act which, given all the circumstances of her layover, resulted in an accident which arose out of and in the course of her employment.

We recognize that Appeals Adjudicator Kaliciak denied the worker's appeal on the grounds that she was not under the control and supervision of her employer at the time of the accident, she was not on duty when the accident occurred but rather her activities were strictly personal in nature, and the fact that she was paid during the time of the layover would not automatically entitle her to compensation.

In our view, the employer exercised a general control over the worker while on layover in Amsterdam. The requirement that the worker stay in a hotel selected by the employer, the necessity of contacting the employer if she wished to use different accommodation, and the fact that in a general sense she was required to make herself available for reassignment leaves us to conclude that the worker was under the general control and supervision of her employer at all times, notwithstanding certain freedoms afforded the worker to move about Amsterdam. We agree that the fact that she was paid during the time of the layover would not automatically entitle her to compensation. However it is indicative of the extent to which the employer regarded her layover as employment-related and as an important part of her job. Although the worker had not been assigned to a particular flight when the accident occurred, we have, for reasons already mentioned, concluded that her activities bore a reasonable relationship to her employment and therefore should not be construed as being strictly personal.

DECISION

The appeal is allowed. We leave to the Board the determination of the amount and extent of benefits owing to the worker.

DATED at Toronto, this 25th day of June, 1986.

SIGNED: J. Thomas, N. McCombie.

WORKERS' COMPENSATION APPEALS TRIBUNAL

MINORITY DECISION NO. 44

I have read the decision of the majority of this Panel of the Tribunal and while I agree that the facts are as set out in the decision, I cannot agree with the conclusions reached by the majority on those facts. The worker by her evidence indicated that she dined and socialized in one restaurant until approximately 1:30 a.m. She decided then to proceed to another cafe. I do not accept that walking in a large foreign industrial city at 1:30 a.m. constitutes a reasonable act similar to sightseeing in the middle of the afternoon.

The worker for purely personal reason decided to visit a friend and in so doing I would agree with the decision of the Appeals Adjudicator that "she was not on duty when the incident occurred but rather her activities were strictly personal in nature and it cannot be construed that what she was doing at the time was for the purpose of her employer's business and for that which she was hired."

The intended visit was a distinct departure on a personal errand not require to sustain herself or within what would be considered as a prudent or reasonable act.

For the above reasons I am satisfied that the worker's injuries can not be said as having arisen out of and in the course of her employment.

DATED at Toronto this 25th day of June, 1986.

SIGNED: K.W. Preston.

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Workers' Compensation Appeals Tribunal

DECISION NO. 47

Tribunal d'appel des accidents du travail

Panel Chairman: S.R. Ellis

Member: David Mason

Member: Sam Fox



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 47

THE APPEAL PROCEDURE:

This is a worker appeal of the February 28, 1985 decision of the Workers' Compensation Board Appeals Adjudicator, T.D. Allamby. Mr. Allamby's decision affirmed a decision of the Claims Review Branch dated April 19, 1984.

The appeal was heard on January 30th, 1986, by a panel of the Appeals Tribunal consisting of S.R. Ellis, Chairman, David Mason, member of the Tribunal representative of employers and Sam Fox, member of the Tribunal representative of workers.

The appellant worker was represented by John Martin, Compensation Chairman for the local union, United Steelworkers of America. The employer was represented by John Kupecki. Also appearing was Chuck Shafley, representing the successor company to the worker's former employer. Mr. Shafley appeared because of the fact that the worker's employer in this case is seeking to have responsibility for part of the alleged hearing loss charged to the worker's former employer. The Tribunal was assisted by its counsel Linda Gehrke, a member of the Tribunal Counsel's office.

The panel received and considered the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials. It also received with the consent of all concerned parties a revised work history for the employee and a revised sound survey. The revised work history was completed at a joint meeting on January 21, 1986, between the worker, the worker's representative and the employer's representative and the revised sound survey based on that work history was made by G.E. Menzies of the employer's Department of Industrial Hygiene and is dated January 23rd, 1986. The revised work history and sound survey were received under cover of a letter to Tribunal Counsel from Mr. Kupecki dated January 24, 1986, and the two documents under cover of that letter were entered as Exhibit One in these proceedings.

For the reasons set out below, the worker was not called upon to testify and no other oral testimony was heard. Submissions were made by the worker's representative, the employer's representative, the former employer's representative and the Tribunal's counsel.

THE ISSUES AND HOW THEY ARISE:

The worker is claiming compensation for a bilateral hearing loss on the basis that it was caused by his exposure to industrial noise during his employment with his present employer or, alternatively, in part by industrial noise exposure during his employment and in part by exposure to industrial noise during his employment with his former employer.

Hearing impairment caused by exposure to industrial noise is considered an industrial disease under Section 122 of the Workers' Compensation Act.¹ The Workers' Compensation Board's policy concerning the adjudication of industrial noise-induced hearing loss and tinnitus claims is set out in Directive 19, which may be found at page 270 of the Claims Services Division Manual. The sections of that policy relating to industrial noise-induced hearing loss read as follows:

Directive 19. ADJUDICATION OF INDUSTRIAL NOISE- INDUCED HEARING LOSS AND TINNITUS CLAIMS

1. Hearing loss and tinnitus resulting from exposure to hazardous noise levels in employment in the Province of Ontario is accepted as an industrial disease under Section 122 and Section 1(1)(n) of the Act as peculiar to and characteristic of such exposure.
2. INDUSTRIAL NOISE - INDUCED HEARING LOSS

2.1 Based on medical advice, INDUSTRIAL NOISE-INDUCED HEARING LOSS CLAIMS are favourably considered when all the following circumstances apply:

2.1.1 There is a clear and adequate history of five or more years of exposure to hazardous noise, 90 decibels "A" scale, for eight hours per day, or equivalent as noted below: (Ontario Ministry of Labour Regulations).

<u>COLUMN 1</u>	<u>COLUMN 2</u>
Sound level in decibels	Duration - Hours per 24 hour day
90	8
92	6
95	4
97	3
100	2
102	1 1/2
105	1
110	1/2
115	1/4 or less
Over 115	no exposure

NOTE: Sound levels in excess of 90 decibels ("A" scale), will reduce the 5 or more year exposure requirement.

2.1.2 The frequency level and type of exposure is known.

¹Unless otherwise stated, all section references in this decision refer to section numbers as they existed prior to April 1, 1985.

- 2.1.3 The average of the four speech frequency levels 500, 1000, 2000, and 3000 Hertz (Hz.) in the American National Standards Institute (ANSI) or International Standards Organization (ISO) audiograms is 25 decibels in each ear.
- 2.2 Since individual susceptibility to noise varies, claims which do not meet the criteria set out in 2.1 are individually judged on their own merit having regard to the nature of the occupation, the extent of exposure, and any other factors peculiar to the individual case. The benefit of doubt applies.
- 2.3 Entitlement for permanent disability is established when all the following circumstances apply:
- 2.3.1 The average of the four speech frequency levels 500, 1000, 2000, and 3000 HZ. in the ANSI or ISO audiograms is 35 decibels in each ear.
- 2.3.2 A presbycusis factor of .5 db for each year that the age exceeds 60 is deducted.
- 2.3.3 Hearing loss in decibels is converted into percentage of disability in accordance with the following schedule:

PARTIAL HEARING LOSS WHERE BOTH EARS ARE AFFECTED:

In single ear 35 dbs. ANSI/ISO.....	.4
In single ear 40 dbs. ANSI/ISO.....	.7
In single ear 45 dbs. ANSI/ISO.....	1.0
In single ear 50 dbs. ANSI/ISO.....	1.4
In single ear 55 dbs. ANSI/ISO.....	1.8
In single ear 60 dbs. ANSI/ISO.....	2.3
In single ear 65 dbs. ANSI/ISO.....	2.8
In single ear 70 dbs. ANSI/ISO.....	3.4
In single ear 75 dbs. ANSI/ISO.....	4.0
In single ear 80 dbs. ANSI/ISO.....	5.0

NOTE:

In bilateral deafness the poorer ear is rated according to the above scale; the better ear according to the scale multiplied by five. The sum of the two gives the combined rating.

- 2.3.4 The level of rating is not influenced by any improvement in hearing attained through the use of a hearing aid.
- 2.3.5 Permanent disability awards are evaluated on a percentage ratio of Ontario industrial exposure to total exposure.

- 2.3.6 Permanent disability awards normally date from the date the Board received notification of the claim. The permanent disability award may be back-dated if the hearing loss has been established and confirmed by the Board's Specialist (Industrial Noise Deafness and Ear Claims). Awards shall date from January 1, 1974 for those cases where the worker has remained in exposure employment as of this date.
- 2.4 Where there is no pre-employment audiogram available, the last Ontario exposure employer is charged in ratio by years to total Ontario exposure employment, the balance being charged to the Second Injury and Enhancement Fund (S.I.E.F.), based on the premise that prior noise exposure employment has caused some pre-existing hearing loss. S.I.E.F. applies to Schedule 1 employers only. (See S.I.E.F. application policy).

On the evidence before him, the Appeals Adjudicator found that the preliminary requirement under section 2.1.1 of a clear and adequate history of five or more years of exposure to hazardous noise, 90 decibels "A" scale, for 8 hours per day or equivalent, had not been satisfied. The Appeals Adjudicator also considered the provisions of Section 2.2 of the policy and determined that in his opinion there was no reason in the circumstances established by the evidence to apply the benefit of doubt in favour of the worker.

There was, therefore, no occasion for the Appeals Adjudicator to go on to consider whether or not there was any entitlement for permanent disability under Section 2.3 of the policy, neither was there any occasion to consider the application of Section 2.4 concerning the question of which employer should be charged with the compensation.

As mentioned above, at the hearing of the appeal before this panel the new evidence concerning the amount of the worker's exposure to hazardous noise levels during his employment with the employer was presented. This evidence consisting of a revised written work history and sound survey was filed by the employer, agreed to by the worker and not objected to by the former employer. This is evidence that was not available to the Appeals Adjudicator.

The concluding paragraph of the new noise survey reads as follows:

"In summary, the worker has been exposed to 89 to 91 db(A) noise levels for 7 months while working as brick mason labour, 89 db(A) for 59 months while working as scrap yard burner, and 86 or 87 db(A) while working as changehouse janitor for the remaining time."

The panel is advised that the Workers' Compensation Board finds it reasonable to accept a margin of error of minus 1 decibel in applying Section 2.1.1 of Directive 19 and, accordingly, it is clear that if the new evidence is accepted, it supports a finding that the requirements set out in Section 2.1.1 of Directive 19 have been met.

This much became clear early in the hearing and at that point the worker's representative indicated that he proposed to go on and prove the entitlement for permanent disability under Section 2.3 of the Board's policy. The representative of the employer indicated that it was his intention to challenge the Workers' Compensation Board's policy of charging the whole of any compensation entitlement to the last Ontario exposure employer where there is no pre-employment audiogram available. (See Section 2.4 of the Board's policy).

The issues for this panel, therefore, are:

- 1) Should the new evidence be accepted and relied upon.
- 2) If so, should the panel go on to hear and determine the subsequent issues concerning entitlement under Section 2.2 of the Board's policy and the charging policy under Section 2.4?

The Panel's Reasoning

The revised work history and Sound survey, which was filed with the approval of the worker and the employer and without objection from the former employer, is the best evidence now available on the issue of the workers' exposure to hazardous noise during his employment with the employer. As such it should be accepted by the panel and relied upon in the determination of this appeal.

Accordingly, for the reasons mentioned earlier, the panel must conclude that it is now clear that the workers' hearing-loss claim qualifies for favourable consideration under the provisions of Section 2.1 of the Board's policy.

The panel does not, however, believe that it should consider and determine the further issues under Section 2.2 and 2.4 until the Workers' Compensation Board has had an opportunity to make its own determination's in that respect.

We believe that the Legislature's intention that the Appeals Tribunal not deal with issues until after the Board's procedures for considering them have been exhausted, as demonstrated in Section 86g, applies in this instance.

Decision:

1. The appeal is allowed.
2. The requirements for favourable consideration of a claim for industrial noise-induced hearing loss as set out in Section 2.1.1 of Directive 19 are found to have been met.
3. The claim is referred back to the Workers' Compensation Board for determination of entitlement under the subsequent provisions of the policy and for determination of the disposition of the charges for the compensation to the various employers potentially involved.

Dated at Toronto this 6th day of March, 1986.

Signed: S.R. Ellis, D. Mason, S. Fox

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Workers' Compensation Appeals Tribunal

DECISION NO. 48

Tribunal d'appel des accidents du travail

Panel Chairman: L.J. Bradbury

Member: K. Preston

Member: L. Heard



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

February 1986

Workers' Compensation Appeals Tribunal

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Workers' Compensation Appeals Tribunal

DECISION #48

THE APPEALS PROCEDURE:

This is a worker appeal of the October 12, 1982, decision of the Workers' Compensation Board Appeals Adjudicator, Mr. F. Kaliciak. Mr. Kaliciak's decision allowed in part the worker's appeal from the Board's Claims Review Branch decision dated March 12, 1982.

The appeal was heard on January 24, 1986, by a panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, K. Preston, a member representative of employers, and L. Heard, a member representative of workers.

The worker appeared and was represented by Mr. H. Sanders from the WCB Workers' Advisor Office. No one appeared on behalf of the employer. The Tribunal was assisted by Mr. R. Nairn, who appeared on behalf of the Tribunal's Counsel Office.

The panel also had the benefit of the history of the claim as it appears in the Case Description Materials. These materials were marked as Exhibit I at the hearing.

The panel heard and considered evidence under oath from the worker. Submissions were made by the worker's representative and by Tribunal Counsel.

THE ISSUE AND HOW IT ARISES:

The worker was employed with the employer from April, 1957. He injured his back in 1965 and re-injured it in 1968. Both injuries were compensable and resulted in the worker receiving a permanent disability pension from WCB which is currently rated at 25%.

This appeal arises as a result of chiropractic treatment the worker received in connection with his low back disability. The history of his treatment is as follows. In 1979, the worker saw S.W. Stolarski, D.C., a chiropractor, for several months but stopped when he found the treatment was not helping him. The WCB refused to reimburse the worker for the cost of those visits on the ground that he had not been referred to the chiropractor by his family doctor or a specialist.

On May 20, 1981, the worker began treatment with another chiropractor, R.W. Rowe, D.C. Once again, the worker claimed he was entitled to be reimbursed by WCB for his costs which represent the difference between the chiropractic charge and his OHIP coverage. By letter dated October 29, 1981, the Medical Aid branch of WCB denied compensation on the ground that there was no information on file that the worker had been referred to the chiropractor by his family doctor or by a specialist. The Claims Review Branch upheld that decision in its letter dated March 12, 1982.

The Appeals Adjudicator in his decision of October 12, 1982, accepted information from the worker's family doctor, Dr. R. Houston. In a letter to WCB dated May 31, 1982, Dr. Houston stated that he had referred the worker to Dr. Rowe for chiropractic treatment. The Adjudicator found that the worker was entitled to payment for Dr. Rowe's services up to July 5, 1982, but not beyond. In denying reimbursement beyond July 5, 1982, the Adjudicator relied on a report from a specialist, Dr. H. Hall, dated July 5, 1982, which stated that Dr. Hall was arranging physiotherapy and a back training program for the worker. Because there was no mention in Dr. Hall's letter that chiropractic treatment was necessary, the Adjudicator found that the worker was not entitled to be reimbursed for the chiropractic treatment beyond July 5, 1982.

Following the Appeals Adjudicator's decision, the worker attended the WCB hospital in Downsview, Ontario for his back on two occasions in 1982. On his discharge, the worker continued his treatment with the chiropractor, Dr. Rowe. At the hearing on January 24, 1986, the worker testified that the treatment provided him with some relief and allowed him to continue working.

At the conclusion of his treatment on January 11, 1984, the worker again appealed to WCB for reimbursement of his costs, for the period from August, 1982 to January, 1984. The Claims Adjudicator responded by letter dated April 24, 1985 that the worker was not entitled to be reimbursed since there was no indication that a referral to a chiropractor was made after July, 1982.

The worker continued working until September 30, 1985, when he was forced to leave work due to back problems.

There are two reports on file subsequent to the Appeals Adjudicator's decision which are relevant to this appeal. One is from the chiropractor, Dr. Rowe, and is dated December 6, 1984. It contains a detailed history of the worker's treatment and problems. The diagnosis is given as "a chronic progressive multiple site spinal subluxation degeneration syndrome". Dr. Rowe also stated he had been able to offer the worker only "temporary symptomatic relief".

There is also a report from Dr. R. Houston, the family doctor, dated September 4, 1985 addressed to the Office of the WCB Workers' Advisor. In the letter, Dr. Houston wrote:

"As I have noted in previous reports to the Board, I did refer patient to chiropractor, and he was referred because nothing else seemed to help and the treatment given by chiropractor did help. The comment I have to make is that Dr. Hamilton Hall did say he was going to make arrangements for treatment, see his letter to WCB of that date July 5, 1982. This was not arranged and (the worker) was never contacted by Dr. Hamilton Hall's office at any time."

Workers' Compensation Appeals Tribunal

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This letter was submitted by the worker's representative to Mr. Kaliciak, the Appeals Adjudicator who heard the appeal in 1982. A memo to the WCB file dated November 27, 1985, states:

"Mr. F. Kaliciak, the Appeals Adjudicator who had the hearing on August 13, 1982, was contacted on receiving Dr. R. Houston's letter of September 4, 1985. I explained the situation to Mr. Kaliciak and he did not feel that the new evidence would alter his decision."

The matter therefore came on for hearing before the Appeals Tribunal. The issue before the panel is whether the worker is entitled to be reimbursed for the costs of the chiropractic treatment for the period from July 5, 1982, until January 11, 1984. The claim is made by the worker under Section 52 of the Workers' Compensation Act then in effect which states:

s. 52(1) Every worker who is entitled to compensation under this Part or who would have been so entitled had he been disabled beyond the day of the accident is entitled,

(a) to such medical aid as may be necessary as a result of the injury;

s. 52(2) In this Act, "medical aid" means medical, surgical, optometrical and dental aid, the aid of drugless practitioners under the Drugless Practitioners Act, ...

s. 52(6) All questions as to the necessity, character and sufficiency of any medical aid furnished or to be furnished and as to payment for medical aid shall be determined by the Board.

The worker claims that his chiropractic treatment was necessary in accordance with s. 52(1)(a).

THE PANEL'S REASONING:

The panel has reviewed the medical evidence on file, as well as the evidence given at the hearing.

The panel notes Dr. Houston's comment in his letter dated May 31, 1982, that the original referral to the chiropractor, Dr. Rowe was through him. Dr. Houston also stated that the worker was able to remain at work largely because of the chiropractic treatment. Dr. Houston wrote "in fact the chiropractor did help and he did keep (the worker) at work a fact that the patient appreciates, his employer appreciated and I would have thought that the Board would appreciate."

The panel is of the view that the subsequent letter dated September 4, 1985, from Dr. Houston addressed and clarified the history of the worker's chiropractic treatment. First, Dr. Houston notes that Dr. H. Hall did not establish the program referred to in Dr. Hall's letter of July 5, 1982. The worker also gave evidence under oath at the hearing on this point and stated that he was never contacted by anyone from Dr. Hall's office with regard to a treatment program.

The panel accepts that evidence and finds that Dr. Hall did not, in fact, refer the worker for physiotherapy or other treatment after July 5, 1982.

Second, Dr. Houston states in his letter of September 4, 1985, that he referred the worker to the chiropractor after July, 1982, and offered his opinion that the chiropractic treatment continued to provide some relief to the worker. In addition, the worker gave evidence at the hearing that the treatment allowed him to continue working.

At the hearing, Mr. Sanders pointed out that the WCB Procedures Manual under Section 52, Document #33/09/01 refers to whether a change of doctors is "medically reasonable" or "interrupts definitive treatment". In this case, Dr. Houston's letters indicate that the chiropractic treatment was the only treatment which offered any relief to the worker. In his letter of May 31, 1982, Dr. Houston noted that the worker had attended the Canadian Back Education Unit but that that had been no help at all to the worker.

Taking into account the medical reports from Dr. Houston and the worker's oral evidence at the hearing, the panel concludes that the chiropractic treatment provided by Dr. Rowe was "medically reasonable" and was the only "definitive" treatment that the worker was receiving. Thus, it appears to the panel that the worker has established that the chiropractic treatment was "necessary" medical aid as required under Section 52 of the Workers' Compensation Act.

Mr. Sanders also raised the question of the worker being reimbursed for his costs incurred in travelling to and from the chiropractor. The worker's evidence was that he travelled approximately 38 miles round trip for each treatment.

In the circumstances of this case, the travel appears reasonable. However, in view of the fact that there is a W.C.B. practice dealing with travel allowances, as well as the fact that the W.C.B. has not yet dealt with this issue, the panel leaves the determination of entitlement to the travel allowance to the WCB.

DECISION:

The appeal is allowed. The worker is entitled to be reimbursed for his costs of chiropractic treatment for the period from July, 1982 until January, 1984. The Tribunal leaves to the WCB the calculation of the amount in question, without prejudice to the worker's right of further appeal should there be any dispute concerning that calculation.

Dated at Toronto this 13th day of February , 1986.

Signed: L. Bradbury, K. Preston, L. Heard.

Workers' Compensation Appeals Tribunal

DECISION NO. 50

Tribunal d'appel des accidents du travail

Panel Chairman: S.R. Ellis

Member: B. Cook

Member: K. Preston



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April, 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 50

THE APPEAL PROCEDURE:

This is an appeal by the worker of the May 31, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, Mr. L. Carr. Mr. Carr's decision affirmed the decision of the Claims Review Branch dated November 5, 1984.

The appeal was heard on February 4, 1986, by a Panel of the Appeals Tribunal consisting of S.R. Ellis, Chairman, Brian Cook, Member of the Tribunal representative of workers, and Kenneth Preston, Member of the Tribunal representative of employers.

The worker appeared and was represented by T. White from the organization, Disabled Workers of Ontario. The employer had notice of the hearing and elected not to appear. The Tribunal was assisted by R. Nairn, a member of the Tribunal's Counsel Office, who appeared in the role of Tribunal counsel.

The Panel heard and considered evidence given under oath by the worker in oral testimony and read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description materials, which were filed at the hearing, copies having been given to the worker's representative in advance of the hearing. The Panel also read the Case Description recital of facts prepared by the Tribunal's Counsel office and agreed to by the worker. It received at the hearing as well other documentary evidence presented by Mr. White. It heard submissions from both Mr. White and Mr. Nairn.

THE ISSUE AND HOW IT ARISES:

The worker is a 55-year-old woman who was working as a machine operator at the time of her accident. On May 11, 1983, she fell from a high stool (about 5 feet high) landing on her right arm and shoulder on the concrete floor at her workplace. In some of the subsequent medical reports the seriousness of the accident tends to be minimized to some degree by describing the accident as "the worker fell off a stool at work" or words to that effect. It bears remembering that the stool was 5 feet high and if one stops to actually visualize that, it will be appreciated that a fall from a sitting position on such a stool constitutes a substantial accident.

The fall occurred just as the plant was going on its lunch break. The worker went to lunch and returned to work. She did not feel initially that she had suffered any serious injury. After about two hours of work, pain began to develop in her right shoulder, arm and neck and she found that she was losing the strength in her hand. When that condition developed she was sent that day by the employer for examination by L. Wong, M.D., C.C.F.P., a member of the Evans Medical Industrial Clinic.

The worker returned to work the next day (May 12) and continued until June 9, 1983, to perform her job. She was able to do this with her right arm in a sling and her elbow supported with a pad on the table of the machine on which she was working. The pain in her shoulder and arm kept increasing, however, and when she visited Dr. Wong on June 10th, 1983, she was advised to stop work for the time being. The doctor thought at that time that she would be off work for "several days from June 9, 1983". The treatment that she had been receiving during this period and continued to receive after she left work was physiotherapy, Tylenol No. 3 and Indocid.

The worker returned to work on August 22, 1983, at the suggestion of Dr. Wong to try light work. She lasted, however, less than one day and had to discontinue work because of the increased pain she experienced with repetitive movements of her right hand and arm. On the same day, she returned to Dr. Wong and in Dr. Wong's report to the WCB of that visit, the Doctor asked the WCB to arrange admission to its Hospital and Rehabilitation Centre. She was admitted to the Centre on October 21, 1983, and discharged on November 4, 1983.

The view of the Hospital and Rehabilitation Centre was that she had a mild shoulder disability which would not, however, prevent her from doing her regular work. The worker therefore returned to work on November 7, 1983.

Again, she lasted only a few hours, before she had to stop because of the pain.

On November 8, 1983, Dr. Wong submitted another report to the WCB concerning this worker. In this report, Dr. Wong mentions the possibility of the worker being seen at the pain clinic at the Toronto Western Hospital.

Dr. Wong also wrote a letter on November 10, 1983 to Ms. I. Rego, the Workers' Rehabilitation Counsellor at the Vocational Rehabilitation Division of the WCB. In this letter she repeated the worker's account of the experience she had with pain on returning to work on November 7, 1983, and indicated that the worker had found the repetitive right arm and hand movement exacerbated her pain. Dr. Wong suggested that the rehab counsellor might assess the worker's work situation from the point of view of finding a job not involving repetitive right arm or hand movements. Dr. Wong concluded her report by indicating that she had, in the meantime, declared the worker unfit for work and had also been in touch with the WCB regarding a possible referral to a pain clinic.

As a result of Dr. Wong's letter, the compensation to the worker was continued pending her examination at the Toronto Western Hospital. She was seen by several doctors at the Toronto Western Hospital in February and March of 1984. Both Dr. R.G. Vanderlinden, M.D., F.R.C.S.(C), a neurosurgeon of the staff of the Toronto Western Hospital Division of Neurosurgery and Dr. W.J. Reynolds, M.D., a specialist in internal medicine, on the staff of Toronto Western Hospital Rheumatic Disease Unit, wrote reports which we have considered.

After the WCB received a report from Dr. Vanderlinden in April, 1984, the worker was examined by the WCB's Medical Branch. The Medical Branch recommended that the worker attend the Board's Psychological Social Evaluation Module ("PSEM") for assessment.

The worker was admitted to the PSEM on September 19, 1984, and was discharged on October 3, 1984.

After the assessments were complete, the PSEM discharge conference concluded that the worker had a mild bicipital tendonitis of the right shoulder and a minor hysterical reaction. It indicated that the patient's "minor hysterical features" were unrelated to the accident of May, 1983. It recommended no further treatment. It recommended that she be discharged to return to regular work and it concluded that there would be no permanent disability.

The worker was discharged to return to regular work and her compensation entitlement was discontinued as of October 15, 1984.

The worker appealed the decision and thus set in motion the process which has led to the Appeals Tribunal considering this appeal.

This Panel must decide whether the worker continued to be temporarily totally or partially disabled after her benefits were cut off on October 15, 1984. If she was disabled, this Panel must then decide whether her disability resulted from the injury caused by the work accident of May 11, 1983.

A major component of the alleged disability is chronic pain exacerbated by repetitive right hand and arm movement.

An analysis of the medical reports on file from both the WCB doctors and the doctors at the Toronto Western Hospital indicates that the worker has, since the date of the accident, complained of pain in her right shoulder.

Initially, the doctors' diagnoses focused on possible organic causes of disability.

Dr. Wong described the worker's injury when she was first examined on May 11, 1983, as "rotator cuff injury right shoulder ..." (Report to the WCB dated November 8, 1983.)

Six weeks after her initial examination of the worker, Dr. Wong diagnosed the worker's condition as:

"?fibrosis? hand shoulder syndrome? tendonitis?" (Report to the WCB dated June 17, 1983.)

The diagnosis in this report seems to indicate that six weeks into the case, having seen the worker on six occasions and having found that she was not responding to treatment, Dr. Wong was puzzled as to what was causing the continuing pain, but was continuing to explore organic causes of the pain.

Several weeks later, the worker was, at the request of Dr. Wong, examined by an orthopaedic surgeon, Dr. G.A. McDonald, M.D., F.R.C.S.(C). He diagnosed the worker's problem as "traumatic tendinitis of the right shoulder". He indicated that he observed no evidence of a rotator cuff tear.

Subsequent reports from WCB doctors and others concerning possible organic causes for the worker's pain did not really advance the matter any further.

Later medical reports explored the possibility of non-organic causes of the worker's pain.

During the period of her admission to the WCB Hospital and Rehabilitation Centre between October 21, and November 4, 1983, the worker was assessed by several doctors, including psychiatrist Dr. M. Tyndel. Dr. Tyndel concluded that the worker did not, "from a psychiatric point of view", suffer a major degree of disability. However, he concluded that the worker had developed a "conversion reaction triggered off by her injury of last May". He noted that the worker's husband had an arthritic condition in his right shoulder which may have had a psychological influence on her since the husband's condition affected the same area as her injury and sustained pain.

The discharge report from the Rehabilitation Centre dated November 4, 1983, diagnosed the worker's condition as "traumatic tendinitis involving the right shoulder with over protection".

Dr. Vanderlinden's report following the examination of the worker at the Toronto Western Hospital in November, 1983, after her unsuccessful return to work, concluded that there was no evidence of any neurological abnormality in the worker and there were signs of psychogenic magnification of pain. He indicated that he suspected the worker had some tendonitis or degenerative changes about the shoulder, but that she was, at the date of the report, probably experiencing a post-traumatic conversion reaction as identified by Dr. Milo Tyndel.

From September 10, 1984, until October 4, 1984, the worker was assessed at the PSEM. She was given a physical examination upon admission, and assessed by an orthopaedic surgeon, a psychologist, a psychiatrist, a remedial gym therapist, an occupational therapist and a social worker. The orthopaedic surgeon concluded that the worker "has a mild degree of bicipital tendinitis in her shoulder" and he indicated that he thought the worker's symptoms are "magnified to a considerable degree by functional overlay". The psychologist also noted psychogenic magnification of pain behaviour. The psychiatrist found no anxiety symptoms and gave it as his view that "certainly the description of the physical symptoms does not suggest a psychophysiological component. On the other hand, he said that the "description of the symptoms and the findings on physical examination point to a certain degree of psychogenic magnification". The psychiatrist also felt that the "reported weakness on the right side and occasional dropping of objects" suggested a "relatively minor hysterical phenomenon". He concluded that the "limited loss of motor and sensory functions suggests a conversion disorder which is not very severe". The psychiatrist indicated that it was his opinion that the conversion disorder was not caused by the worker's injury in May, 1983.

When the worker was discharged from the PSEM on October 4, 1984, the discharge diagnosis was:

1. mild bicipital tendonitis of the right shoulder; and
2. minor hysterical reaction which was felt to be unrelated to the accident of May, 1983.

A later medical report from Dr. W.J. Reynolds, the specialist in internal medicine at the Toronto Western Hospital, Rheumatic Disease Unit who examined the worker on two occasions in February and March, 1984, and saw her again in December expressed the opinion that the worker "is experiencing a post-traumatic neurosis, i.e., a secondary fibrositis, resulting from her accident".

A subsequent report was requested by the Appeals Adjudicator from WCB doctor, Dr. Macfarlane. Dr. Macfarlane reviewed the medical reports and agreed that the basis of the disability was likely non-organic. Dr. Macfarlane indicated that he very much doubted that the worker was disabled to any degree on an organic basis. The Appeals Adjudicator relied on Dr. Macfarlane's report in finding that the worker did not continue to be disabled after October 15, 1984.

Having examined all the medical reports, it is clear that the doctors who have examined this worker have concluded that although there may be some organic cause of the worker's pain, an important cause of the pain may be psychogenic.

It should be noted that the diagnostic terms used in the reports concerning this worker - terms such as 'conversion reaction', 'hysteria reaction', 'psychogenic pain' and 'post-traumatic neurosis' - do not indicate that the worker is dishonest when she says she is experiencing pain in her right arm and shoulder. Terms such as 'conversion' disorder or 'psychogenic pain' disorder imply that the worker's symptoms cannot be explained by a known physical disorder or pathophysiological mechanism. In the case of psychogenic pain disorder, even if there is some related organic pathology, "the complaint of pain is grossly in excess of what would be expected from the physical findings". Although the symptoms of individuals suffering conversion or pain magnification disorders are caused primarily by psychological rather than organic factors, the symptoms are not 'falsified' - they are not consciously simulated or exaggerated by the individual. For these individuals, the pain or the loss of physical function is 'real'. Malingering is distinguished from conversion and pain magnification disorders because it involves the conscious exaggeration or simulation of symptoms.

It must be noted, however, that the mere presence of pain does not mean a worker is disabled under the Act. The Act does not provide compensation for pain and suffering. In order for pain to constitute a compensable disability under the Act, it must affect the worker's capacity to perform work. If, for example, when performing certain muscular movements a worker experiences pain at a level of intensity which prevents her from continuing to perform those movements, then under the Act she would be found to be disabled. The Act would provide compensation for such disability if the pain resulted from an injury caused by a work accident.

¹ American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (Third Edition), at pages 244 to 249.

² id, page 249.

The major issues in this case, therefore, are:

1. To what extent does the pain the worker experiences in fact affect her capacity to work? and,
2. Is the pain the result of her fall at work?

THE PANEL'S REASONING:

In determining these questions, we have considered all the evidence including that of the worker herself.

As was noted in Appeals Tribunal Decision No. 2, a worker's evidence with respect to his or her own condition is important evidence. It cannot, however, be conclusive. Workers who are entirely credible and not wilfully exaggerating or simulating their disability may nonetheless be underestimating their ability to work, or, in pain situations, defining their point of pain intolerance at an unreasonably low level. Thus, in this case, the worker's description of her condition is a significant part of the evidence but a part that must be considered along with all the other evidence.

The worker's situation as she describes it is that she is suffering from constant pain in her right shoulder, arm and hand which repetitive use of her right hand and arm causes to increase to a point where it becomes impossible to continue. She also reports that swelling of her arm and neck results from repetitive use of her right hand and arm. She also complains of weakness in her right hand and arm and describes sudden losses of strength which leaves her prone to dropping objects carried in her right hand, such as a coffee cup.

She has attempted to return to work with the accident employer on two occasions.

She returned in August, 1983, but worked less than a day. She discontinued work because of increased pain. In November, 1983, after being discharged from the Rehabilitation Centre, she again returned to work.

The worker's experience with the development of pain during the five hours that she spent attempting to work on that day is particularly significant. It was, according to her, severe. Her own description of the experience as it appears in her letter of November 22nd, 1983, to the Worker's Compensation Board is particularly instructive. This letter was written in response to a letter from the Board advising her of the discontinuation of her compensation by reason of her failure to continue to do the light work assigned to her by her employer as of November 7th. The letter reads in part as follows:

"...I began work at 7:30 a.m. ... until 1:30 p.m. of the same day. Half an hour after I began working, the pain began to increase severely. By 11:00 a.m., I was working with excruciating pain and worked so until the pain in my shoulder and the swelling in my neck forced me to stop.

I then went immediately to Dr. Wong's office. She found me to be in a great deal of pain and dismayed at the severe swelling in my neck. She asked me why I had returned to work and I replied that "the team" in HRC had said that I was recovered enough to return to "unrestricted" employment and because of my eagerness to return to work. She then prescribed more pain killers and told me not to return to work for a period of between one to two weeks. On the 16th day of November, 1983, I returned to Dr. Wong's office for a pre-arranged visit. She now indicates that I will be off work for a period of between two to four weeks.

Although the work I returned to was not one of a strenuous kind, I could not, with duration, work. In fact, I cannot do any housework, much cooking, sew or even write."

The worker indicated to the Hearing Panel that her condition has not changed. She does some housework but is assisted by her daughter-in-law in this regard. She is able to do some laundry and cooking, although she indicated she cannot do heavy ironing or washing of pots. Neither can she sew. The worker indicated that she could do work which did not involve continued use of her right arm.

Where a disability is caused by chronic disabling pain of a post-traumatic psychogenic nature, the medical literature identifies a number of environmental stimuli or personal characteristics that may be contributing to or be the reason for the pain syndrome. It could be argued that these, not the accident, are the cause of the disability; that the accident was simply the occasion for the symptoms to emerge. However, the Panel finds the question of cause in this case to be fairly straightforward. It is satisfied that if the worker is not consciously exaggerating her symptoms, then her condition must be seen to have been caused by the accident on May 11, 1983. The complaints have been continuous and consistent and the medical treatment continuous, and the role of other factors are purely speculative.

The absence of any discernible organic cause for a chronic pain condition is obviously of major concern in assessing the nature and quality of the disability arising from the pain. It is impossible to measure objectively the level of pain and it is a well-accepted medical fact that the effect of any particular level of pain may vary dramatically from one individual to another and from one individual circumstance to another. Some individuals in some circumstances will function effectively while enduring levels of pain that would totally incapacitate other individuals in other circumstances. How people experience pain and how they react to the pain they experience is a personal matter for which there are really no objective criteria much less an objective method of assessment.

In assessing the effect of pain in an individual case, the WCB and this Tribunal will have the benefit of the impressions of doctors and others who have watched the worker function and react in various settings but both those observers and ultimately the WCB decision-makers and this Tribunal are all significantly dependent on a worker's subjective description of his or her pain experience. Given the potential for abuse by malingeringers and dishonest claimants, it is a worrisome position in which to be placed.

The medical literature does, however, indicate that some people do experience real pain at disabling levels resulting from organic causes that cannot be found or from psychogenic magnification or other psychological or psychiatric phenomena the nature and particulars of which do not appear to be very well understood, or from some combination of the two. And it is important that the approach of the Board and of this Tribunal to cases that fall potentially into such a category should not be too greatly influenced by a concern about the potential for abuse. It must be appreciated that such cases have not only a high potential for claimants abusing the system, but also a high potential for the system inflicting grave injustices on claimants. Honest workers who actually suffer pain at disabling levels for which no organic causes can be discovered, and who are ultimately denied compensation because their description of the pain experience is not believed, suffer not only their disabling pain, but also the denial of compensation and the negative impact on the quality of life for themselves and their families which that denial will normally entail. They also suffer the indignity of, in effect, being disbelieved. Adjudication mistakes in these cases have greater potential than most for engendering high levels of anger, frustration and alienation.

In the present case, it is, in this Panel's view, apparent from the medical records that the basic difference between the viewpoint of the Toronto Western Hospital doctors and that of the WCB doctors is that the WCB doctors consider that the worker is consciously exaggerating the amount of pain which she is experiencing.

That this is the crux of the matter may be seen particularly from the following circumstance. Early in November, 1983, the worker was discharged from the Downsview Rehabilitation Centre after a lengthy assessment, and the Centre's conclusion at that time is basically the same conclusion that it came to after the PSEM assessment a year later. The discharge diagnosis at that point of time was "traumatic tendonitis involving right shoulder with over protection". The discharge assessment read in part as follows: "...a mild right shoulder disability which would preclude her from carrying out above shoulder level movement." Since her regular job had been determined not to require above the shoulder level movements, the Centre recommended that she be returned to her regular job and that the compensation be discontinued.

The worker, as described previously, returned to her employment pursuant to those instructions on November 7th, 1983. The worker's experience with the development of pain during the 5 hours that she spent attempting to work on that day was, according to her, as we have seen, severe.

What is most significant about that experience in this context is that it simply did not figure at all in the subsequent WCB's PSEM assessment. In the history of the worker's case set out in the PSEM admission report, the reference to the November 7, 1983, return to work reads as follows:

"The worker informs me that she did go back to work, but she was not able to work for more than 2 or 3 hours. She has not worked since."

Nowhere in the reports of the WCB doctors is there any mention of pain experienced at a disabling level caused by repetitive right hand and arm movement as a symptom to be taken into account in the final diagnosis.

Had the WCB doctors accepted the worker's description of her pain experience in the November return to work as a non-exaggerated account of a real experience, their final diagnosis would have had to take that experience into account. The worker's condition did not materially change from the time the WCB sent her back to work in November, 1983, from when it sent her back to work finally in October, 1984. If the truth was that she could not in November, 1983, work with a repetitive right hand and arm movement for more than an hour or two without creating excruciating, disabling pain, then there was no evidence to suggest that that would not also be her experience when she was returned to work in October, 1984.

The diagnosis in October, 1984, is understandable only on the basis that the worker's description of her experience on November 7th, 1983, was rejected as consciously exaggerated or that it was overlooked or misunderstood. Had that description been accepted as reliable, then in this Panel's opinion the assessment of the worker's condition would have had to take the reality of pain at a disabling level caused by repetitive movement of the right hand and arm into account even in the absence of discernible organic cause. It would not have made sense to declare her fit for regular work without addressing and resolving that experience.

From a treatment point of view, the literature suggests that a return to work is often the right medicine for a person suffering chronic pain, but in this context it is apparent that the Appeals Adjudicator's conclusion that the worker "did not continue to be disabled beyond October 15, 1984" did not reflect a treatment strategy, nor were the WCB's doctor's conclusions concerned with treatment.

Accordingly, if the Panel were to conclude that the worker's account of the November return-to-work experience was not exaggerated then it would also have to accept that the WCB's medical account of the worker's disability was deficient in failing to take account of the symptoms of disabling pain caused by repetitive right hand and arm movement.

The evidence that speaks to the reliability of the worker's report of her symptoms is as follows. In the first place, it is apparent that the reports of Dr. Wong, who, it should be noted, is not the worker's family physician but a doctor to whom the employer sent the worker in the first instance, do not indicate any reservation as to the reliability of the worker's description of her symptoms.

The WCB psychologist who evaluated the worker in October, 1983, found her to be friendly, courteous and well oriented, and indicated expressly in his report that there was "no evidence of ... malingering".

On the occasion of her first attempt to return to work in August of 1983, when she had the same experience as was repeated in November 1983, the WCB file contains a handwritten notation by a person unknown, acknowledging that the worker "did try" to return to work.

Similarly, following the November 7, 1983, experience, there is Memorandum No. 12 in which an unidentified member of the WCB staff concluded that "true working capacity does not appear to have been established. Further lost time appears in order".

Dr. Vanderlinden himself, in his April report, after mentioning that there were signs of psychogenic magnification of pain and that he suspected that she does have tendonitis or degenerative changes about the shoulder as shown by the bone scan but was probably now experiencing a post traumatic conversion reaction as previously identified by the WCB psychiatrist concluded: "in the meantime, this reaction is at a subconscious level and, therefore she is disabled" (emphasis added).

On August 30th, 1984, the worker was assessed in her home by a WCB social worker. The social worker found her "extremely pleasant and co-operative". She demonstrated she said, "a good sense of humour, warm, friendly, and open".

The WCB psychologist who examined her on September 12, 1984, as part of the PSEM assessment described his impression in the following terms: "She is slightly preoccupied with her symptoms and over-protective. Covered her shoulder with her sweater when she saw that the windows in my office were open. She was co-operative, honest and frank. She made excellent contact with the interviewer and appeared to be a reliable informant. This lady is frustrated with her inability to return back to her job" (emphasis added). The psychologist concluded that the worker gave indications of psychogenic magnification of pain behaviour, but he was not able to find clear manifestation of a conversion hysteria.

The physiotherapist who reported on December 6, 1984, from the Toronto Western Hospital obviously did not have the impression that the worker was exaggerating her symptoms. In her report on December 6th, 1984, the therapist indicates that because there had been no improvement after 3 weeks of attending pool therapy, and due to the "nature and severity of her neck and shoulder pain" she suspected a possible "sympathetic involvement"³ - "i.e., she has skin changes and swelling in her arm." As a result of those observations, the therapist recommended different treatment involving connective tissue massage, etc. In the Panel's view, this is not a report that is consistent with any perception of malingering or exaggeration.

Dr. Reynolds, in his report on January 7, 1985, concluded with this flat statement: "There is no question that this patient is disabled because of her pain" (emphasis added).

The evidence which throws doubts on the sincerity of the worker's description of her symptoms is as follows.

In the first place, of course, all of the medical evidence supports the view that the reported pain experience is grossly exaggerated beyond what could be expected, given the evidence of organic cause.

³The Panel takes this to be a reference to involvement of the sympathetic nervous system.

The Centre's first report on the worker, the admission report dated October 24, 1983, includes the following:

"This 53 year old machine operator, appears to be over protecting her right upper extremity, and there are inappropriate physical responses. She seems to have a low threshold to pain. Due to these factors, it is difficult to be precise in the examination concerning her right shoulder movements. However, on distraction, she appears to have greater range of movement."

The admitting doctor referred the worker to psychiatric evaluation on October 24, 1983, and in the memorandum to the psychiatrist, the doctor indicated that "this lady tends to over protect her right upper extremity, and was very difficult to examine. On distraction, there appears to be greater range of movement of her right shoulder."

In the Centre's Discharge Report dated November 4, 1983, it is observed that during her program at the Centre (this was the first assessment at the Centre) she did not show any significant improvement and was "quite over protective of her right shoulder". The Occupational Therapy Department reported that at a light level of activity she did not appear to have any difficulty with repetitive hand and forearm movement at the waist level. The assessment team, therefore, concluded that since her work required no above shoulder level work, she should be able to cope with her regular work.

The Discharge Report does not give any details as to the repetitive hand and forearm movement that she engaged in during the occupational therapy program. If it was constant, quick repetitive work of the nature that she engaged in when she returned to he employment on November 7, 1983, then this might be evidence conflicting with the worker's report of her experience a few days later.

During the September 10, 1984, examination for admission to the PSEM the examining doctor reported that she "was very cautious and guarded during various manoeuvres". The doctor observed, "it seems unlikely that this patient is as disabled as she makes out to be". (Emphasis added.) He also reports that while "she does not feel that she is able to work ... she did indicate she has to do all the laundry and cooking for the 3 men in her life".

The report from the gym, which was part of the PSEM assessment program, indicated that the person responsible for that program believed that "this lady has recovered well enough to return to the work force, although she does not think so."

The occupational therapy report indicated that the worker had a full range of right shoulder movement, but "on activity movement was extremely guarded." The therapist was of the view that the worker was "focussing on symptoms too much and magnifying her symptomatology to a certain degree." In the therapist's opinion, "she should have been capable of more sustained physical activity, especially in terms of weight handling and return to work would be the best form of treatment."

Finally, she had a psychiatric evaluation by a WCB psychiatrist on September 11th, 1984. That psychiatrist focussed to a considerable extent on what he called the "inconsistencies in her reporting".

He mentioned that the worker told him, as an example of the problem of the weakness in her right hand, that she could not carry her purse in her right hand as she would drop it. He then noticed, however, that during the interview she had 2 or 3 occasions to go to her purse and that she invariably picked it up with her right hand and put it down on her right side.

The Panel observes in this connection that the worker does not complain that she cannot use her right hand or arm. She says they pain her constantly but that if she uses them repetitiously over a period of time, a severe pain develops and that if she carries things in her right hand, they are susceptible to being dropped unexpectedly. It is not inconsistent with the description of her symptoms as found in other reports or in her evidence before this Panel that she would use her right hand to go into her purse, or would pick it up with her right hand for the purpose of looking into it and put it down again on her right side. She is right-handed.

The psychiatrist referred to other matters he identified as inconsistencies. The worker told him, for example, that while her experience in getting to sleep was variable, she did have considerable difficulty in getting to sleep even with the medication she was taking. He contrasted that with her statement to the admitting doctor a few days earlier to the effect that with the drugs she was taking, she now had no difficulty sleeping. The Panel notes that two weeks earlier she is reported to have told the social worker that she had a lot of difficulty sleeping.

The psychiatrist concluded that the worker was "an extremely pleasant, communicative individual, who was somewhat inconsistent in describing her symptoms and tended to overemphasize their severity", (Emphasis added.)

Having reviewed all of the evidence pertaining to the question as to whether the worker consciously exaggerates her pain experience or its effect, including the worker's own testimony at the hearing, the Panel is satisfied that the worker's account of her symptoms and particularly the description of her experience of attempting to return to work on November 7, 1983, is reliable and not consciously exaggerated.

Since the opinion of the WCB's Hospital and Rehabilitation Centre concerning her condition and her ability to return to work fails to take account of the serious aggravation of pain caused by repetitive movement of the right hand and arm, which the worker experienced in returning to work in November, 1983, the Panel must prefer the opinion of the doctors at the Toronto Western Hospital, notably Dr. Reynolds and Dr. Vanderlinden.

DECISION:

1. The appeal is allowed.
2. The Panel finds that from October 15, 1984, to February 4, 1986 - the date of the Appeals Hearing - the worker was temporarily partially disabled. That partial disablement was caused by the May 11th accident. The disability consists of an inability to engage in repetitive right arm or hand motion, even of the lightest nature, without generating pain at an unacceptable and debilitating level; a weakness in the hand and arm which limits the worker's ability to carry with confidence objects such as a cup of coffee, and an inability to perform any above-the-shoulder work with the right arm.
3. The file is referred back to the Workers' Compensation Board for determination of the amount of compensation owing to the worker as a result of these conclusions. The worker's representative presented to the Panel evidence of the worker's activity in searching for a job over the past year or so, but that is evidence that can be provided to the Board for purposes of its determination of the amount of compensation.
4. The question of the ongoing compensation entitlement after February 4, 1986, is, of course, a matter to be determined by the Board. The Panel would hope that the worker could be offered counselling services which would assist her in learning to overcome the pain.

DATED at Toronto this 15th day of April, 1986.

SIGNED: S.R. Ellis, B. Cook, K. Preston

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Workers' Compensation Appeals Tribunal

DECISION NO. 53

Tribunal d'appel des accidents du travail

Panel Chairman: L. Bradbury

Member: D. Beattie

Member: K. Preston



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 53

THE APPEAL PROCEDURE

The worker appeals the June 25, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, M.L. Crapper.

The appeal was heard on February 5, 1986, by a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, D. Beattie, a member of the Tribunal representative of workers, and K. Preston, a member of the Tribunal representative of employers.

The worker appeared and was represented by counsel, F. Valente. The worker's wife appeared as a witness on his behalf. The employer was represented by R.E. Foley, Safety Superintendent. Z. Onen appeared on behalf of the Tribunal's Counsel Office.

The Panel heard and considered evidence under oath of the worker and his witness as well as the evidence of the employer's representative. The Panel read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials. These materials were marked as Exhibit #1 at the hearing.

Submissions were made by Mr. Valente, Mr. Foley, and Ms. Onen.

THE ISSUE AND HOW IT ARISES

The issue in this appeal is whether the worker's left knee disability after November 30, 1983, and subsequent surgery, resulted from the worker's compensable left knee problem which occurred on January 24, 1983. If the Panel concludes that the disability suffered after November 30, 1983, did not result from the original compensable accident but instead resulted from a car-pushing incident on November 30, 1983, the Panel must then determine whether the car-pushing incident arose out of and in the course of the worker's employment.

The history of this appeal is as follows. The worker was employed as a labourer in a paper mill for about 9 years. On January 24, 1983, the worker slipped on a catwalk at work, fell two feet, and hit his left knee on a steel platform. The medical diagnosis, reported to WCB, was a soft tissue injury to the left knee.

The worker returned to work the following day on light duty. However, he stopped working on February 8, 1983, because of increasing pain in his knee. WCB granted compensation for the injury and the lost time from work.

Initially, the worker was treated conservatively with rest, analgesics and physiotherapy. However, he continued to have pain in his knee and received further treatment including a left knee arthrogram and an arthroscopy on July 18, 1983. This investigative surgical procedure was performed by Dr. J. Remus. Following this procedure, Dr. Remus reported that he found no abnormalities in the knee to warrant further investigation or treatment.

The worker returned to work on August 15, 1983, and his compensation was terminated. He performed his regular work, which was fairly strenuous. The worker's evidence was that he lifted four foot logs with a picaroon and placed them in a chute where they were ground. He placed 20-23 logs in the pocket of the chute every two minutes. The worker demonstrated the motion required - his legs were planted on the ground, while he twisted his upper body to pick up the logs and manoeuvre them into position.

The worker testified that from the time he returned to work on August 15, 1983, to November 30, 1983, he did his regular work. However, his left knee was sore and not as strong as it was before the accident. The worker testified that he did not receive medical attention for his knee; however, he did contact Dr. Remus who told him the pain was due to weak muscles and his knee would improve with time.

The incident giving rise to this appeal occurred on November 30, 1983. The worker's shift started at 3:00 p.m. He drove his car to the employer's parking lot, arriving at 2:00 p.m. The worker drove through the parking lot but there were no spaces available. He noticed a woman walking to her car and asked if he could have her spot. This woman's car became stuck on a ridge of snow. The worker went to help her and while pushing the car he felt his knee crack suddenly and he experienced immediate pain and swelling in the knee.

The worker parked his car in the woman's spot and went into work. He reported the incident to the company nurse immediately and he also spoke to Mr. Foley.

The worker's evidence was that he intended to work and started his shift. However, after half an hour the pain in his knee was so unbearable that he left work and went to the hospital.

On December 19, 1983, Dr. Remus operated on the worker's left knee. Dr. Remus performed an arthrotomy of the left knee for a torn lateral meniscus with an excision of the lateral meniscus. The worker underwent further surgery on January 23, 1985, consisting of an arthrotomy with a reconstruction of the medial and postero-medial ligaments. The subsequent surgery was performed by Dr. J.C. Burrell who treated the worker after August 1, 1984.

The worker was unable to return to work after November 30, 1983, although he plans to return to work when his doctor feels he is able to do so. Dr. Burrell apparently advised the worker it will be 12 to 18 months after the surgery of January, 1985, before he is able to return to work.

THE PANEL'S REASONING

At the hearing, the worker was questioned by the Panel members, by the Tribunal's counsel, the employer's representative and his own counsel. The Panel found the worker to be a credible witness. As well, the employer's representative, in his role as a witness, was found to be credible.

The employer's position was that the disability arising after the incident of November 30, 1983, was unrelated to the compensable accident of January 24, 1983.

The employer argued that the worker had recovered from the January, 1983, injury and experienced no residual disability. The employer noted that the worker returned to his regular work, which was quite strenuous, and was able to perform that work without difficulty. The employer noted that the worker had not attended at the company's First Aid Office between the time of his return to work on August 15, 1983, and the November 30, 1983, incident.

The worker, on the other hand, argued that the disability which he suffered after November 30, 1983, including surgery on December 19, 1983, and January 23, 1985, resulted from the January, 1983, compensable accident and was, therefore, compensable also.

In deciding whether the disability resulted from the injury of January 24, 1983, the Panel considered the nature of the injury caused by the January 24, 1983, accident, the extent to which the worker had recovered prior to November 30, 1983, the nature of the incident on November 30, 1983, and the nature of the injury and disability subsequent to the car moving incident.

THE INJURY CAUSED BY THE JANUARY 24, 1983, ACCIDENT

There were a number of medical reports dealing with the January 24 injury. Dr. Limbert provided a report to WCB at the time of the accident that the worker suffered a soft tissue injury to his left knee.

When the knee did not improve, Dr. Remus performed an arthrotomy on the left knee with a lateral meniscectomy in July, 1983. His post-operative diagnosis was "multiple tears, lateral meniscus, left knee".

EXTENT OF RECOVERY PRIOR TO NOVEMBER 3, 1983

There are medical reports relating to this period. Dr. Remus wrote on December 11, 1984, that:

"The patient, therefore, has had disability related to his left knee from the time of his operative arthroscopy on July 21 through surgery on December 19, 1983."

Dr. J.C. Burrell, an orthopaedic surgeon, reported on August 1, 1984, as follows:

"He tells me that during this interval (August 15 to November 30, 1983), he felt that his leg was about 75% of normal function. He said that he had aching pain most of the time which was minor enough that he could do his job but it was present every day ... he remembers having to be careful going up or down stairs."

The worker gave evidence that his knee was painful most of the time between August 15 and November 30, 1983. He testified that he contacted Dr. Remus who told him that he was suffering from weak muscles and his knee would improve over time.

The worker's wife appeared as a witness at the hearing and gave evidence that following his return to work in August, the worker complained constantly of problems with his left knee. She testified that she treated his knee with cold compresses and massage on a daily basis. The worker's wife testified that she did all the outside work at home since the worker's knee was too sore to enable him to do it.

The Panel understands that a spouse, in a case like this, has an interest in the outcome of the appeal, so that her evidence must be weighed with that in mind. In this case, however, the worker's wife provided the Panel with evidence under oath on the important point of the worker's continuing knee problems during this interval. The Panel found her to be straightforward and honest and accepts her evidence that the worker's knee problems during this time were continual and severe.

On the basis of the evidence of the worker and his wife, as well as the evidence of the doctors, we conclude that during this period, the worker had not fully recovered from the left knee injury caused by the January 24, 1983, accident.

THE NATURE OF THE NOVEMBER 30, 1983, INCIDENT

In considering what consequences flow from the original injury, the Panel must look at the nature of the incident which occurred on November 30, 1983.

The Panel notes the British Columbia Worker's Compensation Board Decision No. 195, 14 June, 1976, which stated:

"Once it is established that an injury arose out of and in the course of employment, the question arises as to what consequences of that injury are compensable. The minimum requirement before one event can be considered as the consequence of another is that it would not have happened but for the other. ...Not all consequences of work injuries are compensable. ...looking at the matter broadly and from a "common sense" point of view, it should be considered whether the previous injury was a significant cause of the major injury. ...Similarly, compensation is not denied just because a work injury would not have happened if the claimant did not have some pre-existing weakness."

The question for the Panel is whether the worker broke the chain of causation by moving the fellow employee's car. Although another person helped the worker, the car moving did require heavy lifting and pushing. The Panel must decide whether the worker's original compensable injury was a significant cause of the disability suffered after the November 30 car pushing incident. If it was, the worker would be entitled to further compensation for his knee disability.

The Panel notes the worker's evidence that Dr. Remus told him his knee would get better over time and that he should continue to cope with his pain while doing his regular work. The worker's doctor did not advise him to restrict his activities.

The Panel also notes the worker's evidence at the hearing that he was anxious to be on time for his shift, because his co-worker could not leave until the worker arrived, and because the company docked his pay for lateness. The Panel accepts that the worker acted impulsively, without thought for his knee, but finds that this was not unreasonable in the circumstances. The Panel concludes that the severity of the incident on November 30, was not in itself enough to break the chain of causation between the original compensable injury and the subsequent disability.

NATURE OF INJURY AND DISABILITY AFTER NOVEMBER 30, 1983

Dr. Burrell reported on February 21, 1985, following the second operation on January 23, 1985. He wrote:

"It is now clear that he had a ligament instability which was mainly medial and postero-medial. These injuries and instabilities could easily have occurred with either of the two injuries that the patient has described in the past."

Following the Appeals Adjudicator hearing, Dr. Burrell was asked for a further opinion on the relationship between the first and second incidents and the subsequent knee disability. Dr. Burrell reported on April 18, 1985, that:

"My conclusion, therefore, is that the ligament instability which required the subsequent surgery on my part was much more likely caused by the November 30 accident than by the January, 1983, accident.

The key here really is whether he had symptoms of instability prior to the second accident or not. I would have to go back to my original consultation letter in which I felt that instability was not a major symptom prior to the second accident."

The Appeals Adjudicator also contacted Dr. H.B. Jackson a Surgical Consultant at WCB for his opinion. On March 14, 1985, Dr. Jackson gave his opinion in Memo #11 as follows:

"I agree with Dr. Burrell's comment in his letter of the 21st of February that the ligament instability could have resulted from either of the two injuries under discussion, but noting that Dr. Remus and Dr. Milne had already indicated tenderness at the site of these torn ligaments after the first accident, it would be my opinion that this ligament instability was indeed initiated by the first accident and aggravated by the second incident."

The Appeals Adjudicator requested a second opinion from Dr. Jackson, following receipt of Dr. Burrell's letter of April 18, 1985. Dr. Jackson's opinion dated April 24, 1985, is set out in WCB Memo #12 as follows:

"In his first report to Dr. Lester dated January 9, 1985, Dr. Burrell states that the man's ligament instability was much more likely related to the second accident than the first, the first being merely a fall directly onto the knee which is as a rule inconsistent with a cruciate ligament injury. I agree with this. This opinion of Dr. Burrell on January 9, 1985, is based on Dr. Burrell's diagnosis that this man had an anterior cruciate deficient knee.

However, it was subsequently shown at surgery that the anterior cruciate ligament was intact and that the major injury appeared to be a medial laxity of the medial collateral ligament with a component due also to deficiency of the postero-ligament. On this basis, Dr. Burrell indicated that these injuries and instabilities could easily have occurred with either of the two injuries that the patient described in the past. As pointed out previously..., I agree also with this concept.

We now come to Dr. Burrell's letter of April 18, 1985, in which he indicates the key is whether this man had symptoms of instability prior to the second accident or not. Dr. Burrell goes on to say that when initially seen, he did not consider that instability was a major symptom in this man. I'll accept that the instability was not a major symptom, but the man did state that he had to be careful going up and down stairs, implying a degree of lack of confidence in the stability of the knee at the very least.

I still stand by my opinion expressed in the final paragraph of Memo #11."

The Panel finds that Dr. Jackson's analysis of the problem is clear and reasonable. Dr. Jackson notes that the area of injury was the same in both incidents and that the worker had continuing instability from July, 1983, to November 30, 1983, which resulted in his disability after November 30, 1983.

When considered in conjunction with the testimony of the worker and the worker's wife, both of whom testified as to significant continuing problems with the knee before November 30, 1983, the Panel is satisfied that Dr. Jackson's opinion, which was based on instability prior to the November 30, incident, is to be preferred to Dr. Burrell's opinion in his letter of April 18, 1985.

COMPENSATION

The worker suffered a work-related accident to his left knee on January 24, 1983, which was compensable. The Panel must decide whether the disability suffered by the worker after November 30, 1983, resulted from that injury.

Dr. Burrell expressed the opinion that the subsequent disability could have been caused by either incident but stated that the key was whether the worker had instability in his knee in the period between July and November 30, 1983.

Dr. Jackson's opinion was that the worker did have instability during that period and this satisfied him that the subsequent disability resulted from the first injury. The November 30, 1983, incident occurred in the employer's parking lot and not while the worker was working his shift. However, if the disability is a natural consequence of the compensable injury, it is compensable even if triggered or aggravated by a non-employment incident. (In saying this, the Panel is not making a finding that the November 30, incident did not arise out of and in the course of the worker's employment.)

In this case, the evidence indicates that the pain resulting from the original injury persisted after the worker returned to work in August, 1983, and became worse after the car moving incident, resulting in two surgical operations.

On the basis of the evidence before it, the Panel finds it is unlikely the worker would have suffered the disability after November 30 had it not been for the January, 1983, compensable injury. We find that the original compensable injury was a significant cause of the disability suffered after November 30, 1983. Therefore, although the car moving incident aggravated the worker's disability, the disability was still a direct result of the original compensable injury.

Having decided that the two incidents are causally connected, the Panel does not make a finding on the question of whether the accident on November 30, 1983, arose out of and in the course of the worker's employment.

DECISION

The appeal is allowed. The worker is entitled to compensation for his left knee disability after November 30, 1983, including the subsequent surgery and a reasonable period of recovery.

The Panel leaves to the WCB the calculation of the amount in question without prejudice to the worker's right of further appeal should there be any dispute concerning that calculation.

DATED at Toronto this 23rd day of April, 1986.

SIGNED: L. Bradbury, D. Beattie, K. Preston

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Workers' Compensation Appeals Tribunal

DECISION NO. 54

Tribunal d'appel des accidents du travail

Panel Chairman: S.R. Ellis

Member: N. McCombie

Member: D. Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

June 1986

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 54

THE APPEAL PROCEDURE

This is an appeal by the worker of the January 24, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, L. Carr. Mr. Carr's decision affirmed the decision of the Claims Review Branch dated June 4, 1984.

The appeal was heard on February 10, 1986, by a Panel of the Appeals Tribunal consisting of S.R. Ellis, Panel Chairman, N. McCombie, a member of the Tribunal representative of workers, and D. Jago, a member of the Tribunal representative of employers.

The worker appeared and was represented by A. Calderone. The employer had notice of the appeal and elected not to appear. The Tribunal was assisted by J. Siegel, a member of the Tribunal's Counsel Office who appeared in the role of Tribunal counsel.

The Panel heard and considered oral evidence given under oath by the worker and read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials which were filed as Exhibit #1 at the hearing. A copy of the Case Description and the attached materials had been given to the worker's representative in advance of the hearing. Filed at the hearing with the Case Description and attachments was a letter from Ms. Calderone requesting that a number of changes be made to the case history as outlined in the Case Description. That letter was entered as Exhibit #2.

The Hearing Panel received oral submissions from both Mr. Siegel and Ms. Calderone.

THE ISSUE AND HOW IT ARISES

On April 6, 1982, the worker, a security guard employed by a firm of security guards was assigned in emergency circumstances to guard the employer's own office. The office was located in a block in downtown Toronto that had suffered from a major fire that evening and the area in which the office was located was under the control of police and firefighters and the electrical power had been shut off. The employer's office had suffered water damage and it was imperative that a guard be stationed in the premises during the night until the situation had stabilized.

It was a cold night and the water from the fire hoses had frozen on the sidewalks and streets.

The worker had come off two long shifts at customers of his employer's but was nevertheless required to accept this midnight shift assignment since apparently the employer had no other persons readily available.

After receiving permission from the police to enter the area, the worker was approaching the office along the darkened street when he stepped on an unseen and unexpected icy surface. His feet went out from under him and he landed on his back striking his head.

The worker was 39 years old at the time of his accident.

The worker continued to work until August 8, 1982, when the pain in his head and back got to the point where he could no longer continue.

From August of 1982, to January of 1984, he was unemployed. He received total temporary compensation until February 14, 1983. As indicated in the Claims Review Branch decision, the reason for the discontinuation of the entitlement at that time was that the medical branch of the WCB felt that by that time, as far as the condition of his head and neck was concerned, there was no reason why the worker could not have returned to work as a security guard. The CRB felt that as of February, 1983, the reason the worker was unable to return to work was the condition of his lower back, and that "a satisfactory relationship between the condition of the worker's lower back and the accident in April, 1982, had not been established". The entitlement to compensation for lost wages and medical expenses that might have been incurred due to the lower back condition was therefore denied.

The Appeals Adjudicator came to the same conclusion. The last paragraph of his decision reads in part as follows:

"The Appeals Adjudicator concludes that there is an absence of any reporting of the low back injury arising from the accident at work on April 6, 1982, until August, 1982, and is unable to establish a satisfactory relationship between the condition of the low back and the accident at work."

The first issue, therefore, for the Appeals Tribunal is whether or not it is correct to say that the low back condition complained of by the worker constitutes a personal injury by accident arising out of and in the course of his employment.

THE PANEL'S REASONING

Prior to his accident in April, 1982, the worker had been steadily employed. He had spent four years with the RAF and had been a member of the detective core of the Jamaican constabulary. He became a landed immigrant in Canada in 1976. He had spent some time as a member of the Port Police at the Toronto Harbour.

One of the major concerns evident from the Appeals Adjudicator's decision was the fact that there is no complaint on record of a problem with the lower back until sometime in August of 1982. Almost four months after the accident.

The worker testified that ever since the accident he has suffered from head, neck, upper and lower back pain and has been consistent in his complaints to the various doctors that he has consulted in that respect from the beginning. The evidence of the nature of the worker's complaint during May, June and July is obscured by the fact that while the worker reported the injury immediately to the employer, the employer did not report to the Workers' Compensation Board until August 4, 1982. The worker testified that the doctor who he consulted in April recommended that a claim be made to the Workers' Compensation Board but that he, the worker, did not know anything about Workers' Compensation and was intent on continuing to work. Accordingly, the doctor did not report the complaint to the Compensation Board in April. The Board received the first doctor's report on August 6, 1982.

The practice of the doctor who treated the worker through April, May and June was taken over by another doctor, Dr. Cutler, who saw the worker for the first time on July 28. The worker testifies that he saw his original doctor once a week through April, May, June and July and that soon after the accident he was given a prescription for a lumbosacral brace. It was a written prescription to a supplier located on Weston road. The worker testified that he did not buy the "corsette" at the time it was prescribed but waited until June until his back got to the point where he felt he could not do without it. He had delayed purchasing it because of the expense (\$70).

The Board does not have on its file any written medical reports from the doctor who treated the worker during April, May, June and July. The worker testified that he tried to obtain copies of the doctor's reports of his visits during that period but he was left with the impression by Dr. Cutler's office that the records of the doctor's predecessor were less than complete for the period in question. This is confirmed to some extent by a note in the Board's file of a conversation between a Board investigator and Dr. Cutler in September, 1982, when Dr. Cutler conceded that the worker may have complained to his predecessor between April and July but that there was nothing recorded. Dr. Cutler indicated to the investigator that the records did indicate that the worker was seen by his predecessor on April 7, 16, and 23, 1982, regarding his neck.

The worker points out that the focus of the early reports on his head and neck were understandable because that was the area of major concern at the outset. There was a concern that there may have been some fractured vertebra in the neck and indeed there are mixed views amongst the Board's radiologist and others as to whether or not the X-rays disclose any fracture. It is clear in any event that there was indeed quite a serious injury to the neck and the Panel agrees with the worker that it is understandable in those circumstances that the early reports would have been preoccupied with that problem to the exclusion of his lesser complaints. Dr. Cutler has confirmed in a letter dated October 25, 1982, that the worker was under his care since he first saw him, July 28, 1982, with regard to both upper and lower back pain. The fact that when Dr. Cutler first saw him, the worker was complaining of lower back pain is consistent with the worker's testimony that he had been complaining of lower back pain to Dr. Cutler's predecessor right from the beginning.

The worker's report of the accident to the WCB which was not filed until sometime apparently in August describes the original injuries as follows:

"I fell on my back hitting the skull extremely hard (at the back)! I felt as if the neck was broken and suspected fracture of the spine (back) neck and skull."

The employer's report of the accident, which the worker had difficulty in getting the employer to file and which was only filed after the worker filled the form out himself and took it to the employer's office for signature, describes the injury as follows:

"A constant pain in the entire neck back and sometime back of head".

The Etobicoke Medical Centre has also confirmed that the worker attended physiotherapy on numerous occasions beginning on July 29, 1982, during which he received "short wave diathermy to the cervical lumbar spine, ultrasound to the sacroiliac joint, and isometric lumbar flexion exercises." The worker testified that the physiotherapy was prescribed by his family doctor when he first saw her in April and it wasn't until July that he was able to be scheduled for treatment by the physiotherapy office in the Etobicoke Medical Centre.

The Hearing Panel also notes that there is no other explanation for the back pain in the worker's lower back. X-rays taken on January 10, 1985, disclosed no evidence of disc narrowing "very minimal degenerative lipping anteriorly at L3-4, L4-5 levels." It is not therefore a case of a degenerative disc disease.

The worker advised the Appeals Tribunal and the Board of a number of persons with whom he had worked during the period April through August of 1982, who would have known of his constant problems with his back. One of these individuals provided a written statement. This statement does not specify the time during which the witness worked with the worker, but it would have been in the summer prior to August, 1982, when the worker ceased employment. The witness statement reads as follows:

"I the above-mentioned worked with (the worker) on an assignment at Coca Cola Plant 46 Overlea Boulevard Toronto. On several occasions while talking to (the worker), I noticed that he was in severe pain, and taking Tylenol tablets. This was due to the fall... in April 1982. While working he became very agitated, was unable to sit, due to pains in his lower back coupled with severe headaches. (The worker) was replaced by Mr. Creelman the Plant Manager who was unaware of the circumstances. Workmens' Compensation called my home (as the employer) refused to communicate either by phone or letter, and the above-mentioned information was given."

There is mention in the file of an unrelated car accident in February of 1983, and one doctor's report that the worker advised him that the car accident had increased his back pain. The worker testified however that the accident in question involved his car being backed into by another car while he was sitting in it in the parking lot of his church, involved \$100 damage to his car and absolutely no physical injury whatever. He had mentioned the car accident casually to the secretary of the doctor in question. It is clear in any event that the low back complaints were on the record beyond dispute by August of 1982, and the Hearing Panel accepts the worker's testimony as to the minor nature of the car accident.

The worker had no difficulty with his back prior to the April accident and there is no evidence of any occurrence in the months between April and August which would explain the development of the back condition.

The Hearing Panel does not find it difficult to believe that a fall of the nature described by the worker, severe enough to have probably caused a minor fracture of the vertebra in his neck, would also have caused an injury to his mid and lower back. On the basis of the material in the files and the worker's testimony, the Hearing Panel concludes on the balance of probabilities that the back injury is significantly related to the accident at work.

DECISION

1. The appeal is allowed.
2. The Hearing Panel finds that the low back pain from which the worker is currently suffering is a disability caused by an injury by accident arising out of and in the course of his employment.
3. Because of the view of the Claims Review Branch and the Appeals Adjudicator that the worker's low back problem was not attributable to the accident at work, the Board's procedures for examining and assessing the extent of the disability attributable to the low back condition have not been exhausted. Accordingly, the worker is referred back to the Board for assessment of compensation entitlement dating from February 14, 1983, arising by reason of the worker's low back condition.

DATED at Toronto this 6th day of June, 1986.

SIGNED: S.R. Ellis, D. Jago, N. McCombie

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Workers' Compensation Appeals Tribunal

DECISION NO. 55

Tribunal d'appel des accidents du travail

Panel Chairman: N. Catton

Member: N. McCombie

Member: D. Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

MARCH 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL
DECISION # 55

THE APPEAL PROCEDURE:

The worker appeals the decision dated March 4, 1985 of Mr. W. Ireland, Appeals Adjudicator.

The appeal was heard on February 10, 1986, by a panel of the Tribunal consisting of N. Catton, Panel Chairman, N. McCombie, a Tribunal member representative of workers, and D. Jago, a Tribunal member representative of employers.

The worker appeared and was represented by Mr. J. Martin from his union, the United Steel Workers of America. The employer was represented by Mr. J. Kupecki, Employee Relations Assistant. The Panel was assisted by Ms. W. Corston and Ms. Z. Onen, both members of the Tribunal's Counsel Office.

The Panel considered the evidence given by the worker, under oath, at the hearing. The Case Description summary of the facts, as well as the documents attached to the Case Description were also considered by the Panel. The Case Description and attachments were marked as Exhibit #1 at the hearing. In addition to this information, Mr. Martin provided the Panel with a copy of the pathologist's report dated May 11, 1983. This was marked as Exhibit #2. Mr. Martin also provided the Panel with a report about another worker from Dr. E.J. MacFarlane, a surgical consultant employed by the Board. This report was marked as Exhibit #3. In addition, the Panel also had the transcript of the Appeals Adjudicator's hearing and this was marked as Exhibit #4. Submissions were made by Mr. Martin, Mr. Kupecki and Ms Corston.

THE ISSUE AND HOW IT ARISES:

On December 10, 1976, the worker fell off a bench at work. He injured his back and struck the back of his head against a cabinet. A lump developed at the base of his skull. After several months his back injury resolved itself, but the lump or mass at the base of the skull remained.

Following the accident, the worker developed headaches and pain when he moved his neck, which he attributed to the mass at the base of his skull. The mass itself was not painful. In 1983 his headaches became more severe and his family physician referred him to a surgeon to have the mass removed.

When Dr. Richards, the surgeon, first examined the worker, he described the mass as "a soft cyst-like lesion" which was an epidermoid cyst rather than lipoma. A lipoma is a benign tumor usually composed of mature fat cells.

On May 9, 1983, the mass at the base of the skull was surgically removed. At the same time, a cyst was removed from the worker's lower back. Following the surgery, Dr. Richards described the mass as a lipoma. This description is in keeping with the pathologist's report, submitted by Mr. Martin.

Because, in his opinion, the lipoma was related to his accident at work the worker requested benefits from the Board to compensate him for the lost time which resulted from the surgery. He did not claim that the cyst on the base of his spine was work-related.

In this case there is a great deal of medical evidence. The worker's representative provided the Panel and the Board with articles which discuss the relationship between trauma and lipomas, in addition to reports that concerned this case specifically. The Panel also had reports from physicians employed by the WCB.

At the request of the worker's representative, Dr. T. Haines, who specializes in community medicine at McMaster University, reviewed the case. In his report, Dr. Haines excluded the known medical and dermatological causes for the development of this particular lipoma, and noted that the lipoma developed immediately after the accident. He also stated that the relationship between trauma and the subsequent development of lipoma is reasonably well established and cited two medical papers in support of this position. These papers were available to the Panel and the employer.

The worker's representative also obtained a report from Dr. D. Rosenthal, Head, Division of Dermatology, McMaster University Medical Centre. Although Dr. Rosenthal acknowledged that "lipomas are not commonly found to be post traumatic" (emphasis added) he concluded that "there is enough evidence both in the literature and in common sense to argue that in certain cases, trauma may well cause lipoma."

In contrast to these opinions, there are three opinions from physicians employed by the WCB who discount the possibility of a relationship between trauma and the development of lipoma. Dr. E. Dowd, the Director of Medical Services for the WCB, initially wrote that the medical relationship was unreasonable. After reviewing the medical evidence submitted by the worker's representative, Dr. Dowd appears to have altered his view slightly and advised the Appeals Adjudicator "if you wish to accept, I have no serious objection". The Panel also considered Dr. MacFarlane's opinion about the other case which on the face of it appeared similar to the case before the Panel. In that case Dr. MacFarlane did not accept the diagnosis of traumatic lipoma, but recommended that entitlement be granted for an unresolved haematoma which took on the appearance of a lipoma.

Dr. Richards, who surgically removed the lipoma was not prepared to offer an opinion on its possible origin, because of numerous theories on the development of lipomas.

The Appeals Adjudicator reviewed all of the evidence with the exception of the pathologist's report and found that the evidence was not wholly supportive of a relationship between trauma and the development of this lipoma. For this reason he denied the worker's claim. Upon receipt of this decision, the worker asked that the Tribunal consider his claim.

The issue before the Panel is whether there is a probable causal relationship between the lipoma which was removed in 1984 and the accident at work in 1976.

THE PANEL'S REASONING:

The worker has consistently maintained that the lump at the back of his head developed immediately after the accident at work. The Panel found the worker to be straightforward and credible in his oral testimony. The employer's representative also accepted this evidence. The medical reports, which date back to the original accident, also support the worker's statements.

From our review of the evidence, it is clear that there is no conclusive medical reason for the development of a lipoma. We do know that certain families may have a tendency to develop lipomas. We also know that there are documented case histories of lipomas appearing after a specific trauma.

When asked at the hearing, the worker denied any family history of lipomas. There is also no indication in any of the medical reports that this worker had any other lipomas.

The medical evidence, in support of and opposing the worker's claim is not conclusive. The opinions of Dr. Haines and Dr. Rosenthal are, however, based upon their assessments of the facts in this case, as well as a review of the literature. Unfortunately, the Board's physicians did not provide the Appeals Adjudicator or the Panel with the same support for their opinions. It would have been of assistance to the adjudicators in this case, when assessing the evidence, to have been aware of the authorities relied upon by the Board's physicians.

The employer's representative asked the Panel to refer this case to another doctor, in an attempt to obtain a more conclusive opinion. The worker's representative thought that the Panel had sufficient evidence before it to make a decision. In the Panel's view a referral to another doctor would not provide it with additional helpful evidence. The literature has been canvassed and the possible explanations for the development of this lipoma have been assessed.

Faced with this conflicting evidence, the Appeals Adjudicator denied the worker's claim because the preponderance of medical evidence was not wholly supportive (emphasis added). The test applied by the Adjudicator is too rigorous. Adjudicators of claims for workers' compensation benefits should determine if disability was probably caused by the accident (WCAT Decision #2). It is not necessary for them to find that the evidence is wholly supportive of the workers's claim for benefits to be payable.

In determining the most probable cause of the disability the Panel made the following findings. The lipoma developed at the site of the trauma and immediately after the trauma. The worker did not have either a personal or familial history of lipomas. The Panel also accepted the opinions of Dr. Haines and Dr. Rosenthal who provided the most complete and balanced reports. For these reasons, we find that the accident at work was the most probable cause for the lipoma. The worker is therefore entitled to temporary total compensation benefits during the period he was off work for the surgery for the removal of the lipoma.

DECISION:

The appeal is, therefore, allowed. The Workers' Compensation Board is directed to determine the temporary total benefits to be paid for the period during surgery and recovery for the removal of the lipoma.

DATED at Toronto this 14th day of March, 1986.

SIGNED: N. Catton, N. McCombie, D. Jago

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Workers' Compensation Appeals Tribunal

DECISION NO. 56

Tribunal d'appel des accidents du travail

Panel Chairman: R.E. Hartman

Member: F. Lankin

Member: D. Mason



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NUMBER 56

THE APPEAL PROCEDURE:

This is an appeal by the employer of a decision of J.M. Davies, Appeals Adjudicator, dated January 30, 1985, in which the worker was allowed entitlement for a shoulder disability arising out of an industrial accident on February 10, 1982.

The appeal was heard on February 11, 1986, by a panel of the Appeals Tribunal consisting of R.E. Hartman, Panel Chairman, F. Lankin, a member of the Tribunal representative of employees, and D. Mason, a member of the Tribunal representative of employers.

The employer was represented at the hearing by W. Denniston, its Personnel Manager. M.S. Fluelling, a Registered Nursing Assistant with the employer attended as an observer. The worker was in attendance and was represented by R. Ingles, Benefits Representative. The Tribunal Counsel Office was represented by D. Munro.

The Panel confirmed that both parties had had an opportunity to review the Case Description materials prior to the hearing and to make submissions regarding its contents. These materials were then entered as Exhibit "1". With respect to these materials, the employer submitted a list of alleged discrepancies and inconsistencies in the documents contained in Exhibit "1". With the consent of the worker's representative, this list was entered as Exhibit "2".

The Panel read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description materials. The Panel heard and considered submissions both generally and specifically with respect to the Exhibits before it from the employer and worker representatives and the Tribunal Counsel Office.

THE ISSUE AND HOW IT ARISES:

On February 10, 1982, in the course of his employment with the employer, the worker was attempting to tighten a bolt on a dye with a wrench. The bolt was particularly tight and the worker used a four foot steel tube as leverage. Reaching well about his head with his right hand, he exerted maximum effort in pulling the tube downwards. In doing so, he felt a sudden pain in his right upper arm and shoulder and states he heard a cracking sound in his shoulder joint. He reported the accident immediately.

The worker was examined by his family doctor the next day, February 11, 1982. Dr. Kirk diagnosed a pull to a muscle in the right upper arm. Dr. Kirk advised the worker to rest at home the following day, February 12, and return to light duties on February 15. The worker followed this advice and when he returned to work, he was assigned light duties.

On February 19, 1982, the worker slipped on some ice in his driveway. He was walking to his car with his right hand in his pocket to relieve the pain in his right arm. When he fell, he landed on his right side, striking his elbow. No treatment was sought by the worker as a result of the fall and there was no lost time from work.

On May 11, 1982, the worker was seen again by Dr. Kirk, complaining of ongoing problems with pain in his elbow and shoulder. The doctor recalled that the worker mentioned the fall on the ice during this visit. Dr. Kirk referred the worker to Dr. Denton, of Woodstock General Hospital, and the worker attended this hospital's emergency department on three occasions - May 21, September 15, and November 15, 1982 - to receive Xylocaine and Aristocort injections for pain in his right elbow and right shoulder. When he visited his family doctor again on December 20, 1982, the worker continued to complain of right shoulder pain.

About seven weeks after the accident on February 10, 1982, the worker laid off work as a result of unrelated medical problems. He did not return to work until January 24, 1983. A short time after this return to work, he was referred by his family doctor to an orthopaedic surgeon, Dr. Deadman, regarding the ongoing pain in his right elbow and shoulder. He was examined by Dr. Deadman on February 15, 1983. The doctor recommended further testing but suspected that surgery might be necessary to relieve the pain. The worker was seen by his family doctor in April 1983 complaining of shoulder pain, and was referred to Dr. Warma in Ingersoll for Xylocaine, Celestone and steroid L.A. injections for pain on May 2, and 16, 1983.

On January 25, 1984, the worker was admitted to St. Joseph's Hospital in London for surgery, with a pre-operative diagnosis of right shoulder cuff syndrome. Dr. Deadman performed surgery for repair and acromioplasty and, during surgery, discovered that the worker had a tear in the shoulder cuff and that the problem included the long head of the biceps. He corrected these at the time of the surgery and the worker was subsequently relieved of his pain symptoms.

The worker's claim to entitlement for his shoulder and elbow disability was first denied on June 10, 1983, and again by the Claims Review Branch on March 22, 1984. His claim for shoulder disability was allowed by the Appeals Adjudicator on September 30, 1985, the decision presently under appeal. The worker did not pursue elbow disability on this appeal.

At the hearing, it was confirmed that the only issue before the Panel was whether or not the shoulder disability resulted from the accident on February 10, 1982. There was no dispute by the employer with respect to the description and circumstances of the accident on February 10. The employer also clarified at the hearing that it was not seeking to establish a pre-existing condition of any kind.

THE PANEL'S REASONING:

The issue before the Panel is one of causation. Was the worker's right shoulder disability caused by the industrial accident on February 10, 1982 or, as the employer contends, by the fall on the ice on February 19, 1982?

In making decisions on issues like this, the medical records during the relevant period are often useful in establishing a causal link. As one might expect, however, these records are not completed with the difficulties of a subsequent panel deciding causation in mind. Some reports are more complete and more useful than others. In some cases, it cannot be determined on the basis of existing reports whether medically or factually a causal link exists. In all cases, it is important to review each report in the context in which it was made and in the context of all medical evidence available.

At the hearing, the employer contended that it was not possible for Dr. Deadman, or any other doctor, to determine the precise cause of an injury some two years after it happened. The employer stressed that this was especially true where a doctor must choose between two incidents occurring within a two week period, where either one could have been responsible for the injury. It was the employer's view that the fall on the ice on February 19, 1982, was a more serious injury than the injury caused by the tightening of bolts on February 10, 1982. The employer submitted that the medical reports, hospital records and notes in the WCB file contained inconsistencies which made reliance on them questionable.

The Panel has considered the employer's enumerations of omissions or errors in the medical reports, documents and WCB notes. The majority of the alleged omissions or errors in these documents are of a clerical nature and most of these are corrected or explained in the remainder of the impugned document. In the Panel's view, there were no inconsistencies or omissions which were of consequence to the issue before it which were not clarified or corrected when reading the entire documentation before it. For example, the family doctor, in a letter dated May 16, 1984, refers to the worker injuring his right shoulder at work on February 11, 1982, and states that surgery to correct the injury occurred on January 25, 1984. In fact, the date of the accident is February 10, and the date of surgery is January 26, and the doctor incorrectly referred to his initial examination date of February 11, 1982, and the worker's hospital admission date of January 25, 1984. These errors do not vitiate the opinion expressed with respect to the causal relationship.

With respect to the medical evidence, the panel did not have the benefit of a detailed diagnosis at the time of injury. A note from Dr. Kirk on February 11, 1982, refers only to a "sore right arm". The employer's report refers to a diagnosis of "(R) Upper Arm - Pulled Muscle". During the WCB investigation, Dr. Kirk confirmed that the worker had complained of shoulder, elbow and right upper arm pain, but said that he did not always note this on his records. Other medical records during the two year period establish that the worker experienced severe pain in his right arm, elbow and shoulder. He received a number of injections for relief of localized pain in the shoulder and elbow with positive short term results.

During the two year period, the worker was treated for pain symptoms diagnosed at different times as a pulled muscle in the right upper arm, tennis elbow, shoulder impingement syndrome, etc. It appeared to the Panel that the attending doctors were not aware of the extent or nature of the injury to the shoulder until after the surgery by Dr. Deadman in January, 1984. In a letter to the WCB dated February 15, 1983, Dr. Deadman suspected that surgery to the shoulder might be required to relieve the symptoms but it was only after the surgery that the extent of the injury and the full medical cause of the symptoms were known.

With respect to the medical evidence supporting a causal relationship, we accept the opinion of Dr. Deadman, the orthopaedic surgeon who treated the worker and performed the surgery on January 26, 1984. In a letter to the WCB, dated August 21, 1984, he gives his opinion that:

"it appears quite obvious that (the worker) sustained a shoulder cuff tear in the original injury for which he is seeking compensation and that the fall was of little if any importance, although it could conceivably have increased the size of the pre-existing tear."

The Panel notes that there is no medical evidence by any doctor who had the opportunity to examine the worker and make a diagnosis during the two year period which supported the employer's contention that the injury was caused by the fall on the ice and not the accident on February 10, 1982. Further, the WCB doctor, Dr. Doyle, who earlier stated there was no link between the disability and the accident, reported to the Appeals Adjudicator in late 1984 that such a link was clearly medically possible.

The Panel, in reviewing the evidence, did not consider the absence of a reference to the shoulder in the original diagnosis to be determinative. Pain in the upper right arm is not inconsistent with a shoulder injury. The worker's description of the accident is consistent with a trauma to the right shoulder causing a tear in the shoulder cuff and injury to the long head biceps. Regarding the fall on the ice, the Panel accepts that the delay of the worker in reporting the fall to his doctor is in keeping with the fall being of a minor nature rather than an attempt by the worker to conceal the occurrence. The Panel notes the fall did not result in lost time from work and no medical attention was sought by the worker.

In summary, the Panel is satisfied that a causal relationship has been established between the accident of February 10, 1982, and the subsequent shoulder disability, corrected by surgery on January 26, 1984.

DECISION:

The appeal is dismissed. The Panel is of the view that the preponderance of medical evidence supports a finding that the accident on February 10, 1982, is the more probable cause of the disability leading to surgery in January 1984, than the fall on the ice in February 1982.

DATED at Toronto this 27th day of March, 1986.

SIGNED: R. Hartman, F. Lankin, D. Mason

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Workers' Compensation Appeals Tribunal

DECISION NO. 58

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: N. McCombie

Member: D. Jago



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 58

THE APPEAL PROCEDURE:

The worker appeals the April 24, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, A.G. Simpson, in which entitlement for a right inguinal hernia was denied.

The appeal was heard on February 4, 1986, in Windsor by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, N. McCombie, a member of the Tribunal representative of workers, and D. Jago, a member of the Tribunal representative of employers.

The worker attended and was represented by L. Derdaele, from U.A.W. Local 1973. The employer, an automotive manufacturer, was represented by A. Langlois, a benefit plan representative with the employer company. The Panel was assisted by J. Siegel in the role of Tribunal counsel.

The Panel had before it Case Description materials summarizing the relevant material in the Workers' Compensation Board file. The Panel also received into evidence a report from Dr. Anderson dated February 2, 1986, and an accident report from the employer company.

The worker testified under oath and submissions were made by the worker and employer representatives and by Tribunal counsel.

THE ISSUE AND HOW IT ARISES:

The worker was employed as a "checker-receiver", a job which required the worker periodically to squat down for several minutes to record information from boxes. He testified that on Friday, June 8, 1984, he had been squatting down for several minutes and was noting information on a clipboard. As he arose from the squatting position he felt pain in the centre of his stomach, going down to the right leg. He testified that he could not move because of the pain and he stayed in the squatting position until the pain went away. He described the position as an awkward one in that he was required to squat, maintain his balance, and hold the clipboard in one hand. He testified that he did not report the incident because the pain went away as fast as it had come on and as a result he did not think it was serious.

The following Monday, June 11, 1984, the worker visited his doctor on a pre-arranged appointment for problems with his ears. During the course of his examination he asked his family doctor about the pain he had experienced on June 8, 1984. His family doctor diagnosed the problem as a right inguinal hernia. Later that day, the worker filled out an accident report at work. The worker was able to continue working at his regular duties until the hernia was surgically repaired in September, 1984, although he continued to experience occasional pain and a burning sensation between June, 1984, and the date of the operation.

What is being claimed, then, is entitlement for surgical repair of the hernia, including lost time due to post-operative recovery.

THE PANEL'S REASONING:

After hearing and observing the worker give his oral testimony, this Panel is in agreement with Appeals Adjudicator Simpson that it has no reason to doubt that the incident occurred as related by the employee. The worker gave his evidence in a straightforward manner and his evidence at the Appeals Tribunal hearing was entirely consistent with evidence contained in the Case Description Materials. We therefore find as a fact that the worker experienced pain in his stomach and right side as he was attempting to rise from the squat position on June 8, 1984. We also find that the act of attempting to stand up from a squatting position constitutes a specific incident. The question before the Tribunal is whether the particular specific incident was sufficient to have been the triggering event.

The accident report which was marked "Exhibit 3" makes reference to the existence of pain in the right groin all week. If this were the case, it would be open to this Panel to conclude that there was a gradual onset of pain without there necessarily being a direct causal relationship to the work place and it would therefore be difficult to establish that the triggering event occurred at work. When questioned about this notation in the accident report, the worker stated that his right hip and side had bothered him all week but that the pain he had experienced in his right hip and side was very different from the pain he experienced on June 8, 1984. The pain which occurred on June 8, 1984, was predominately in the stomach and groin area whereas the pain he had been experiencing earlier in the week was a hip pain towards his back. The hip pain disappeared well before the operation.

We are satisfied that the worker did not experience groin pain earlier in the week and that the groin pain occurred after the incident on June 8, 1984. The worker's testimony when questioned about the accident report was straightforward and he was clearly puzzled by reference to the notation which referred to pain in the groin area. It was his suggestion that the person taking the accident report may have misunderstood the worker or have been focusing on the hernia matter when recording the notation about groin pain. The accident report was not available to the worker prior to the hearing and he answered forthrightly about a notation of which he was previously unaware.

We also note that his family doctor confirmed that as of November, 1983, he did not complain of any groin area pain nor was a hernia found on the examination at that time. The hernia was diagnosed on June 11, 1984.

There is nothing in the Case Description Materials nor in the Board file to specifically confirm or deny, from a medical perspective, a causal relationship between the incident of June 8, 1984, and the hernia.

The post-operative report contained in the Case Description indicates that what was repaired was a right small direct inguinal hernia. The medical literature provided to the parties prior to rendering this decision indicates that a direct hernia is produced by increased intra-abdominal pressure in an area of acquired or congenital weakness. Thus, a problem in establishing causation is the fact that there is inevitably a pre-existing condition in the form of a congenital or acquired weakness. Moreover, a wide variety of incidents ranging from very severe to very minor may be sufficient to increase the intra-abdominal pressure. Heavy lifting may produce intra-abdominal pressure. So may coughing, urination, or bowel movements. Direct inguinal hernias usually occur after the age of 40.

In this case, the worker has not described an incident involving heavy lifting or straining. In this regard we note that the Board's policy with respect to hernia entitlement requires a confirmed diagnosis of hernia and states that a hernia can result from excessive strain or from direct trauma. Medical literature would suggest that the strain need not be excessive.

What the Act requires is that there be personal injury by accident arising out of and in the course of the employment. One of the statutory definitions of accident is disablement arising out of and in the course of employment. See s.1(1)(a)(iii) of the Act. The Board has established a policy to assist in the interpretation of this phrase:

"Disablement arising out of and in the course of employment requires that the disablement which the worker suffers must have some causal relationship with the work performed - that is, it is not sufficient that the disablement comes on during work, but rather there must be something about the work which can be considered to have caused the disablement to come on, such as strenuous work - awkward position - unaccustomed strain - or even a movement arising out of the work which is reasonable to consider has caused the disablement."

Medical literature on hernia causation indicates that a wide range of activities may trigger the hernia to occur. In this case we conclude that the act of standing up from a squatting position is at least as significant an activity as coughing, urination, or bowel movements in its effect on the groin area, and in particular in producing increased intra-abdominal pressure. Accepting the worker's evidence that he did not experience groin pain before June 8, 1984, and that he began to experience groin pain as a result of a specific incident at work which at least arose out of an awkward position or a movement which increased the intra-abdominal pressure leads us to conclude that the worker's disablement arose out of and in the course of employment. As such it constitutes an accident as defined by the Act and the worker is entitled to compensation under s.3(1) of the Act on the basis of aggravation of a pre-existing condition.

DECISION:

The appeal is allowed. We conclude that the combination of a pre-existing condition, aggravated by a specific incident on June 8, 1984, produced a direct right inguinal hernia and that the subsequent surgery was a direct result thereof.

DATED at Toronto this 16th day of April, 1986.

SIGNED: J. Thomas, N. McCombie, D. Jago



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

CADAN
L 95
- D 21

DECISION NO. 59

Panel Chairman: J. Thomas

Member: D. Jago

Member: N. McCombie



June 1986

RESEARCH AND PUBLICATIONS DEPARTMENT
Workers' Compensation Appeals Tribunal

505 University Avenue, 7th Floor, Toronto, Ontario M5G 1X4
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WORKERS' COMPENSATION APPEALS TRIBUNAL

INTERIM DECISION NO. 59

THE APPEAL PROCEDURE

The worker appeals the April 12, 1985, decision of Workers' Compensation Board Appeals Adjudicator F.H. Kaliciak which denied the worker entitlement to benefits from and after April 24, 1984, arising out of an industrial accident on January 16, 1984.

The appeal was heard on February 4 and April 18, 1986, at Windsor, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, D. Jago, a member of the Tribunal representative of employers, and N. McCombie, a member of the Tribunal representative of workers.

On both occasions, the worker attended and was represented by P. Nesseth, Solicitor. The employer was represented by J. Edmonson, from the employer firm. E. Newman from the Tribunal Counsel Office assisted the Panel.

The Panel had the benefit of relevant WCB documents contained in Case Description Materials which were marked as an exhibit at the February 4, 1986, hearing. Other exhibits included:

Exhibit #2 - a copy of an arbitration award dated March 28, 1985

Exhibit #3 - a binder of additional documents filed by the worker representative

Exhibit #4 - a letter from Dr. Haliburton dated January 16, 1986

Exhibit #5 - a letter from Dr. Haliburton dated September 5, 1985

Exhibit #6 - a letter from a WCB Claims Counsellor to Dr. Shaw dated May 11, 1984.

At the outset of the February 4, 1986, hearing, the employer's representative sought to introduce the aforementioned arbitration award. This was opposed by the worker's representative. After hearing submissions from both parties and from Tribunal counsel, the arbitration award was admitted as an exhibit.

When the hearing was resumed on April 18, 1986, the parties and the Panel had the benefit of a transcript of the February 4, 1986, proceedings.

The worker and a co-worker gave evidence under oath. Submissions were made by the employer and worker representatives.

THE ISSUE AND HOW IT ARISES

The worker had been employed by the accident employer since approximately August, 1983. On January 16, 1984, the worker injured his back helping his supervisor lift a welding machine. He saw his family doctor, Dr. Shaw, on January 18, 1984, and was diagnosed as having lumbar spine strain. He attempted to return to work on January 24 and again on February 21, 1984, under a medical restriction that he be assigned light work but on each occasion he was only able to work a short period of time before again laying off on account of back pain.

On April 24, 1984, he again returned to work on an oil pan press. His family physician approved a return to light work which included no lifting or pushing in excess of 20 pounds.

The worker attempted the press job for 15 to 20 minutes, at the end of which time his lower back pain prevented him from continuing. He again laid off work and continued to seek medical attention from his family doctor.

On July 18, 1984, the worker once again attempted to return to work and was assigned to the same press job as he had attempted to perform on April 24, 1984. The worker refused to attempt to perform the job and his refusal led to his discharge on July 18, 1984.

The Workers' Compensation Board recognized the January 16, 1984, accident and Workers' Compensation benefits were paid to the worker until April 24, 1984. Benefits were not paid beyond that date because the Board concluded that the worker was capable of performing modified work, that modified work within the worker's restrictions had been offered on April 24, 1984, and that the worker ought to have been able to perform it. Moreover, the Board found that the worker's failure to look for alternate employment subsequent to April 24, 1984, took him outside the provisions of section 41(1)(b) of the Workers' Compensation Act.

The worker has received no Workers' Compensation benefits since April 24, 1984. He claims entitlement to temporary total benefits until October 25, 1984, when he was considered fully recovered by his family doctor. His entitlement to benefits over this period of time is the issue before this Panel.

THE PANEL'S REASONING

After examining the worker on April 24, 1984, Dr. Shaw concluded that the worker had suffered a recurrence of his previous low back injury. This is indicated not only on the doctor's progress report filed by Dr. Shaw, but on a follow-up report dated November 11, 1985, in which, in describing the events of April 24, 1984, Dr. Shaw notes a "flare-up of pain in the region of his left sacroiliac joint." Moreover, in Dr. Shaw's letter to the Workers' Compensation Board dated May 25, 1984, Dr. Shaw makes the following comment about the worker's attempt to return to work on April 24, 1984:

"I would have thought that the worker would have been able to do this job. He stated that after doing this job for a few minutes his back went out again, and he certainly returned to the office with local tenderness in the region of his left sacroiliac joint."

It is not disputed that when the worker was authorized to return to work on April 24, 1984, a lifting restriction of 20 pounds was imposed for a period of about one month. Nor is it disputed that the oil pans which the worker was required to lift onto the press weighed slightly less than 10 pounds. This would indicate that the job offered to the worker was within his medical restrictions.

However, a more detailed description of the job discloses that the worker was required to lift the oil pan and rotate approximately 90 degrees to face the press. The pan was then inserted into the press by holding it at arms length at a height

of approximately 4 1/2 feet. The worker would then operate the press controls, following which the oil pan was flipped off the press using both hands. On occasion, the oil pan would get stuck on the press and in these situations the worker had to pry the part off the press with a metal rod.

The worker described the press job as one that was definitely not light duty, notwithstanding the weight of the oil pan which was within the medical restrictions. A co-worker who holds an executive position with the UAW also testified that the press job was not a light duty job. In particular, both the worker and the co-worker told the Panel that the most difficult part of the job was pushing the part through the die at the completion of the process because the part was being held at arms length and therefore generated additional strain on the worker's back. The co-worker testified that the particular press assigned to the worker was a large press and was one of the worst jobs in the plant. He indicated that he had never seen anyone on light duty before or after doing a job like that.

Although Dr. Shaw was of the opinion in May, 1984, that he "would have thought that the worker would have been able to do this job", he did express some concern in November, 1984, as to whether the detailed description of the job was within the worker's capabilities. In a letter written by Dr. Shaw to the UAW, dated November 13, 1984, Dr. Shaw states:

"Lastly, regarding discussions between the Board and myself concerning the job that the worker was placed on, I did receive a letter dated 11 May from the Compensation Board asking whether the oil pan job was within the worker's capabilities. I note that there are several discrepancies between the description that I was given and the description of the job outlined to the worker in a letter from R.S. Grant of the Claims Review Branch dated 12 July, 1984. There are certain factors that I found significant, and these were:

- 1) a requirement to rotate to 90 degrees in order to face the press;
- 2) a requirement to lift the parts to a height of 4 1/2 feet from the ground extended to arms length, prior to insertion in the press.

This is extremely significant because of the twisting force developed on the lower back by having to extend an object away from the body. If a 9 pound object is held 24 inches from the body, the lower back muscles have to contract at about 10 times that in order to maintain the body's stability. This results from the distance of the object from the body compared with the distance of the pulling muscles from the spine. I think that at the rate that this job had to be performed this would certainly have a significant effect on the worker's lower back."

It would appear that the rate for this particular press was one part every 12 to 15 seconds. The evidence further establishes that the worker completed 20 to 30 parts on April 24, 1984, before he was unable to continue with the job.

We are satisfied that, although the job may have technically been within the worker's restrictions, nonetheless it generated sufficient force on the worker's back to produce a recurrence of his lower back problem. The fact that a worker is assigned a job that is technically within his medical restrictions does not mean that the worker cannot suffer a recurrence in the course of performing those lighter duties. Evidence that the job is within the worker's capabilities may tend to show that the worker did not suffer a recurrence, but such evidence must be taken as a whole in light of the worker's testimony and medical reports to the contrary. In this case, the evidence of the worker, a co-worker, and the worker's family doctor who examined the worker on the day of his recurrence all indicate that however one chooses to describe the work assigned to the worker, it resulted in a re-injury of his back which prevented him from being able to continue with his work.

Was the worker totally disabled by the recurrence? The worker advised the Panel that Dr. Shaw completed a physician's statement for sick benefits insurance on July 16, 1984, in which he indicated that the worker was totally disabled from April 24, 1984, to July 18, 1984, after which time the worker, according to Dr. Shaw, was partially disabled. Dr. Shaw examined the worker on April 24, 1984, and prepared a report in which he estimated that the worker would be unable to perform regular or modified work for a period of 14 to 21 days. The worker was examined by Dr. Shaw on May 22, 1984, at which time Dr. Shaw was of the opinion that the worker had improved slightly. In his report of November 11, 1984, Dr. Shaw makes reference to an earlier visit on May 14, 1984, in which the worker's range of motion was better but there was some pain on attempting left lateral flexion. At that time, the doctor indicates that there was a discussion about the worker trying light duty again with a 20 pound pull limit. There is a note in the materials dated May 14, 1984, in which Dr. Shaw indicates that the worker is capable of attempting work within a 20 pound pull limit. As of July 16, 1984, Dr. Shaw was of the opinion that the worker's condition had improved to point that he could return to work but only on light duty.

When the worker attempted to return to work on July 18, 1984, he was assigned to the very job that resulted in a recurrence of his low back condition on April 24 and he refused to perform this work.

In accepting the worker's evidence, which is supported by the reports of Dr. Shaw, to the effect that he suffered a recurrence on April 24, 1984, we are of a view that for a period of time thereafter, the worker was unable to return to regular or modified employment. However, by May 14, 1984, it would appear that Dr. Shaw was of the opinion that the worker was capable of returning to some form of modified employment. Although Dr. Shaw indicated that the worker was totally disabled from April 24 to July 18, 1984, in a physician's statement for insurance benefits, we believe that more weight should be given to Dr. Shaw's progress reports in which he concludes that the worker is partially disabled as of May 14, 1984. We believe that Dr. Shaw's regular reporting of the worker's condition should be given more weight than a brief comment in a report to an insurance company.

Thus, from April 24, 1984, to May 14, 1984, we find that the worker was totally disabled and is entitled to Workers' Compensation benefits for this period. From May 14, 1984, to July 18, 1984, we conclude that the worker was partially disabled and was capable of modified employment within the medical restrictions imposed by Dr. Shaw.

We also conclude that the worker was partially disabled, although his condition was improving from July 18, 1984, until his total recovery as of October 25, 1984. Dr. Shaw's report of September 26, 1985, describes physical findings on August 1, August 8, September 14, and October 25, 1984. The reports suggest continual improvement until total recovery on October 25, 1984.

Having concluded that the worker was partially disabled from May 14, 1984, to October 25, 1984, it remains for this Panel to determine what benefits, if any, the worker is entitled to during this period of time.

Section 41(1)(b) of the pre-April 1, 1985, Act describes a worker's entitlement to benefits in situations where the worker is temporarily partially disabled and does not return to work.

"S.41(1) Where temporary partial disability results from the injury, the compensation shall be, ... (b) where the worker does not return to work, a weekly payment in the same amount as would be payable if he were temporarily totally disabled, unless he,

- (i) fails to co-operate in or is not available for a medical or vocational rehabilitation program which would, in the Board's opinion, aid in getting him back to work and in lessening or removing any handicap resulting from his injuries, or
- (ii) fails to accept or is not available for employment which is available and which in the opinion of the Board is suitable for his capabilities."

Where a worker under a temporary partial disability disentitles himself from temporary total benefits by failing to co-operate with the Board or failing to be available for suitable employment, section 41(2) provides:

"Where subclause (1)(b)(i) or (ii) applies, the compensation shall be a periodic amount proportionate to the degree of earnings impairment resulting from the accident as determined by the Board and s.43(4) applies."

From May 14, 1984, to October 25, 1984, there was no suggestion of the need for a Board supported medical or vocational rehabilitation program for this worker. Hence, he cannot be disentitled from temporary total benefits under the requirements of section 41(1)(b)(i). The issue then is whether, during the relevant period, the worker failed to accept or was not available for employment which was available and which in the opinion of the Board was suitable for his capabilities.

Until the worker's dismissal on July 18, 1984, the evidence indicates that the worker considered himself to be totally disabled. When the worker returned to work on July 18, he was assigned to the very job which had produced a recurrence of his back condition on April 24, 1984. The worker testified that he was extremely worried about re-injuring his back and it was this concern that led to his refusal to attempt the job on July 18, 1984. The worker testified that he was available for light duty work after July 18, 1984, and described to the Panel a number of

positions on the paint line and in other parts of the plant that he felt that he could have performed and which would have been lighter duty than the oil pan press job. We are satisfied that the worker had a reasonable apprehension about performing the only work which the employer apparently was prepared to make available to him and we are also satisfied that by July 18, 1984, the worker was available for lighter duty work that was less strenuous than the work offered to the worker on April 24, 1984.

Thus, from April 24, 1984, to July 18, 1984, the worker considered himself to be totally disabled whereas, in fact, this Panel has concluded from a review of the evidence that the worker was totally disabled from April 24, 1984, to May 14, 1984, and was partially disabled thereafter. We are also satisfied that up to July 18, 1984, the only work which was available to the worker at the accident employer was not suitable because the job offered to the worker on July 18, 1984, was the very job that caused a recurrence of his back condition in April.

After July 18, 1984, the worker's evidence is that he didn't really seriously start to look for work until October, 1984, at which time his back had improved to the point that he was able to resume regular employment. The worker has not satisfied us that reasonable efforts were made to find suitable alternative employment after his dismissal. No job search lists were kept by the worker. The worker was unable to give any specific examples of places where he might have looked for work. There was a vague reference to looking for a construction job as a foreman or surveyor but in the absence of a job search list or a specific examples of efforts made to find suitable alternative employment, we do not think that the evidence establishes that the worker made himself available for suitable employment even after he considered himself capable of doing light work in July, 1984.

In a previous decision of the Appeals Tribunal, a worker was found to be partially disabled for a period of time in which she considered herself to be totally disabled. In such circumstances, the Hearing Panel concluded that the worker had not made herself available for suitable employment. In this case, the worker considered himself to be totally disabled from April 24 to July 18, 1984, and this Panel has concluded that from May 14, 1984, onward the worker was partially disabled. We have also concluded that after the worker's dismissal, he did not take reasonable steps to make himself available for suitable employment. Thus, from May 14 to October 25, 1984, in our view, the worker has not made himself available for suitable employment.

In the previous Appeals Tribunal decision referred to above, the Panel noted that the words of section 41(1)(b) are "... available for employment which is available". This raises the issue as to whether it must be shown that there is work which is available, even in cases where a Panel has concluded that the worker was not available for suitable work. The availability of work issue is still being considered by the Hearing Panel in Decision No. 2 and a continuation hearing has been scheduled for July 15, 1986. Because the issue under consideration in Decision No. 2 is relevant to the disposition of this appeal, we are of the view that the final determination of this appeal should await the final decision to be given by the Hearing Panel in Decision No. 2. Once the issue of availability of work has been determined by the Hearing Panel in Decision No. 2 the parties to this appeal will be provided with a copy of the Decision and will be given an opportunity to make written submissions on what effect, if any, final Decision No. 2 might have on the outcome of this case.

DECISION

1. The Panel finds that from April 24 to May 14, 1984, the worker was totally disabled and is entitled to benefits under section 39 of the Act.
2. The Panel further finds that between May 14, 1984, and July 18, 1984, the worker was partially disabled but was claiming to be totally disabled. From July 18, 1984, to October 25, 1984, the worker was partially disabled but was not, in the opinion of the Panel, available for suitable employment.
3. The outcome of this appeal is reserved pending a final determination of the issue of availability of work by the Hearing Panel in Decision No. 2.

DATED at Toronto this 24th day of June, 1986.

SIGNED: J. Thomas, D. Jago, N. McCombie.

Workers' Compensation Appeals Tribunal

DECISION NO. 62

Tribunal d'appel des accidents du travail

Panel Chairman: J. Thomas

Member: N. McCombie

Member: D. Jewell



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

MARCH 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL
Decision No. 62

THE APPEALS PROCEDURE:

The worker appeals the November 23, 1984, decision of the Workers' Compensation Board Appeals Adjudicator, J.M. Davies.

The appeal was heard on February 6, 1986, in London, Ontario, by a Panel of the Appeals Tribunal consisting of J. Thomas, Panel Chairman, N. McCombie, a member of the Tribunal representative of workers and D. Jewell, a member of the Tribunal representative of employers.

The worker was represented by Mr. A. Baillie, from his union, the U.A.W. The employer appeared and was represented by Ms. L. Vaughan. The Tribunal was assisted by Mr. J. Siegel, a member of the Tribunal's Counsel Office.

The Panel heard and considered evidence given under oath by the worker, the worker's representative, and a co-worker. The Panel also read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description materials, filed as Exhibit 1. In addition, the following Exhibits were entered as evidence and considered by the Panel:

Exhibit 2 - a letter from Ms. Vaughan to the Workers' Compensation Board dated January 19, 1984;

Exhibit 3 - a hand drawn diagram of the worker's work station.

The Panel also read the Case Description outline of the facts which was forwarded to the parties prior to the hearing. Submissions were made by the worker's representative, the employer's representative and the Tribunal's Counsel.

THE ISSUE AND HOW IT ARISES:

The worker was employed as a welder by the accident employer. On January 9, 1984, the worker was transferred from one department within the company, to another. This transfer resulted in a change of job operation.

Prior to the change, the worker's job involved "micro-wire" welding from a standing or kneeling position. After the transfer, the worker was required to do "flux core" welding--a process involving a higher temperature and more sparks and splatter of welding material. In addition, the areas to be welded in the new department required a welder to work in a confined space either in a prone position or kneeling with arms extended to perform the welds.

At the time of the transfer, there was a dispute within the company concerning the supply of protective cover-all's. Although the worker had signed a request for two pairs of cover-all's--as per the new company policy--when he started in the new department, he had not yet received them. According to the worker, he approached his new foreman and requested that he be issued a protective leather jacket so he could perform his new job in the prone position without endangering himself with the sparks and splatter of the welding process. It was the worker's testimony that this request was refused, despite an acknowledged company policy which provided welders with such jackets or leather aprons upon request.

For the first three days in his new assignment --January 9 - 11--the worker was able to weld in the prone position by using the cover-all's from his previous department. However, these were turned in on January 11, and thereafter, without the protection of the jacket-- or even the cover-all's which, all parties agreed, provide minimal protection--the worker felt compelled to perform his new job in a crouched position. He testified that he tried to weld in the prone position without protective equipment, but couldn't continue to do so because of the hot "splatter" from the welding process. The crouched position involved him kneeling with his buttocks resting on his heels and stretching his arms into the confined working space. The evidence was that he would remain in this position until he had completed the weld, a process which took about half an hour. At that point he could stand up and stretch before starting the next weld.

On Friday, January 13, the second day of his working in the crouched position, the worker noticed pains and tightness in his low back, extending into his right buttock. During that weekend, he continued to have discomfort which he dealt with by way of pain killers, hot showers and baths, a heating pad and massage.

On returning to work the following week, he continued to have problems. On Tuesday, January 17, he went to the plant nurse. As he had a regular appointment booked with his family doctor the following day, the nurse and he agreed that he should seek his doctor's advice.

On January 18, his doctor diagnosed recurring low back pain with reduced range of motion and muscle spasms. On February 13, 1984, the worker returned to his job feeling fully recovered.

The issue before the panel is whether the worker's low back disability was the result of an accident arising out of and in the course of his employment.

THE PANEL'S REASONING:

The employer's position was that the worker had not suffered an accident, but had merely noticed the problem during his employment. There was no dispute as to the existence of the disability itself.

Ms. Vaughan, on behalf of the employer, further argued the following points:

1. That the worker had been free to work in any position, and change positions as he required;
2. That whatever protective equipment his supervisors felt was necessary, was available to him; and,
3. That there had been a delay in reporting of some four days.

In considering these points, the panel came to the following conclusions:

1. While it was clear that the worker did have the opportunity to change the awkward position he was in, from time to time, he genuinely believed that the crouching position was the best way of performing his job from the standpoint of quality of work and his own protection. The worker indicated, for example, that he could have changed his position during the half-hour welding procedure, but that the welds would not be as strong.

The panel was of the opinion that the worker was a most credible and conscientious employee and would therefore not willingly work in a manner which would jeopardize either the quality of the work or his personal safety.

The panel further notes that it is a long established principle that workers' compensation is a "no fault" system. Unless there is evidence that the worker's awkward working position resulted from "serious and wilful misconduct"--a proposition which no-one suggested--then the particular position in which he worked cannot be grounds for disentitlement.

2. The question of whether the worker utilized--or the company provided--the appropriate protective equipment, was similarly felt by the panel to be irrelevant in establishing or denying entitlement. The panel believes that the worker had a genuine concern for his own safety in performing a job which can be, by nature, hazardous. There was testimony that the Occupational Health and Safety Act and its regulations are silent on the appropriate protective equipment for welding.*

3. In considering the delay in reporting, the panel took note of the testimony of a co-worker who confirmed that the worker had complained of his back stiffness and tightness "three to five days before he laid off". In addition, the worker's testimony, and that of the co-worker, established that the actual onset was within a day of the change in his working position. The delay in reporting therefore, was felt to be understandable.

After deciding that these points did not disqualify the worker, the Panel looked to whether he had met the requirements of the Act in establishing an "accident". In particular, the Panel considered section 1 (1)(a)(iii) of the Act which defines accident to include, "disablement arising out of and in the course of employment". In addition, the panel also noted the current WCB procedure, which holds that "...there must be something about the work which can be considered to have caused the disablement to come on, such as strenuous work--awkward position--unaccustomed strain..." (emphasis added) to establish entitlement.

The Panel concluded that the worker's low back disablement arose out of and in the course of his employment, as the result of an awkward body position. We therefore are satisfied that the worker has established that he suffered an injury by accident under the Act.

* see Technical Note.

TECHNICAL NOTE

In this case, it was stated that there are no explicit regulations under the Occupational Health and Safety Act, concerning protective clothing for welders.

We note that S. 88 of the Regulation under that Act, provides that:

Where a worker is exposed to the hazard of injury from contact of his skin with... (c) a hot object, hot liquid or molten metal... he shall be protected by, (e) wearing apparel sufficient to protect him from injury...

We do not raise this matter with a view to finding either a violation of, or compliance with this provision, but merely to bring it to the attention of the parties. That question is clearly not within our sphere of competence. However, the parties may wish to contact the Occupational Health and Safety Branch of the Ministry of Labour for further guidance in this matter.

DECISION:

The appeal is allowed and the panel directs that the Workers' Compensation Board pay the appropriate lost time and health care costs. It is left to the WCB to calculate those amounts.

DATED at Toronto this 11th day of March, 1986.

SIGNED: J. Thomas, N. McCombie, D. Jewell



Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

CADON
L 95
- D 31

DECISION NO. 63

Panel Chairman: A. Signoroni

Member: D. Jewell

Member: F. Lankin



June 1986

RESEARCH AND PUBLICATIONS DEPARTMENT

Workers' Compensation Appeals Tribunal

505 University Avenue, 7th Floor, Toronto, Ontario M5G 1X4
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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 63

THE APPEAL PROCEDURE

This is an appeal by the worker from a decision of the Appeals Adjudicator J.V. D'Andrea, dated May 16, 1984, denying the worker any further benefits after April 12, 1978, in respect of her continuing complaints of neck and low back disability. The same decision allowed medical and three weeks total temporary benefits in respect of the surgical excision of a fat necrosis which resulted from the industrial accident of December 12, 1977, and the employer is appealing that aspect of the decision.

The Appeal was heard in London, on May 12, 1986, by a Panel of the Appeals Tribunal consisting of A. Signoroni, Panel Chairman, D. Jewell, a member of the Tribunal representative of employers, and F. Lankin, a member of the Tribunal representative of workers.

The worker appeared and was represented by J. Sousa, a lawyer. P. Dean, plant nurse, attended on behalf of the employer and was represented by T. Carroll, a staff member of the Office of the Employer Adviser. The Tribunal was assisted by J. Seigel, in the role of Tribunal counsel. The Panel heard and considered oral evidence under oath by the worker and three other witnesses. A co-worker of the worker's husband testified on behalf of the worker, and two co-workers still employed by the accident employer testified on behalf of the employer.

The worker's testimony was given in Portuguese language and interpreted by J. Medeiros.

The Panel read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description Materials, which were filed at the hearing, copies having been given to the parties in advance of the hearing. The Panel also read the Case Description recital of facts prepared by Tribunal counsel and agreed to by the parties. It received at the hearing as well the notice of cross appeal filed by the employer and the transcript of the proceedings before the Tribunal on February 6, 1986, when the appeal was adjourned at the request of the worker's representative. Submissions were made by Mr. Sousa, Mr. Carroll, and Mr. Seigel.

THE ISSUE AND HOW IT ARISES

The worker is 46 years old. On December 12, 1977, she suffered an accident at work. She had been carrying with a co-worker a box that had to be taken outside of the plant and because of the icy ground she slipped and fell backward. The incident caused a mild concussion and a muscle spasm in her back. She lost consciousness, she said, for approximately two minutes, then resumed her work for approximately an hour until she was forced to go home because of the pain suffered. The same day she attended at the Emergency Department of the University Hospital in the London area and was released after a few hours. Even though no fractures were identified, the worker suffered on-going pain in her back, and remained off work until April 11, 1978, when Dr. J.M. Berger certified her fit for regular work.

On April 12, 1978, the worker attempted to return to work but could perform her regular job only for an hour. Two weeks later she returned to the accident employer and this time was given light duties.

On May 4, 1978, she was examined by Dr. N. Cohen, an orthopaedic surgeon. The doctor found nothing objectively wrong with her, and the report concludes:

"Impression at this time is that of 37 year old malingerer with no real back abnormality to be seen on both clinical as well as X-ray examination."

The worker returned to work for three weeks in May and because of lack of work was subsequently laid off through June and most of July, 1978. She worked again from late July to mid September, 1978, but did not achieve regular attendance. There is conflicting evidence as to whether on September 14, 1978, the worker quit or was terminated due to absenteeism.

There are no medical reports on file for the period from May 4, 1978, until November, 1979, when she was seen by Dr. E.C. Deadman, an orthopaedic surgeon. Dr. Deadman reported the existence of a "little ball" of tender tissue in her right hip. He found that her complaints of back distress were probably due to degenerative disc disease, but he could find no objective evidence of same.

Furthermore, Dr. Deadman indicated that in his opinion:

"This is going to be one of those problems where the patient continues to complain of back distress probably based on degenerative disc disease and it becomes a question of pain without objective evidence. There is no proof today that she is having pain except for her history, confirmed by an interpreter who has known her for some time. It could be that she was treated rather haphazardly and because of the lack of objective evidence was pronounced fit for work and she was still having symptoms. We will review the X-ray."

A further medical report dated September 30, 1980, is on file from Dr. S. Bailey, an orthopaedic surgeon as well. He found her to be in no acute distress. She was reluctant to move her neck, but there was no specific spasm or tenderness present. In examining her low back, he found her to have discomfort with extension, as well as with double straight leg raising. Her neurological examination was normal. Dr. Bailey found a cyst on the left (sic) buttock, but recommended against surgery unless its condition worsened.

Dr. Bailey re-examined the patient on March 10, 1981, and on April 30, 1982. In his last examination Dr. Bailey confirmed his earlier opinion and indicated that apart from a positive finding of a large mass in the right buttock suspected to be an old hematoma that has left a residual fat necrosis in this area, he did not think that anything further could be done or warranted to assist the worker regarding her constant pain in the lower back and upper right leg.

A radiological report from Dr. R. Haddad, dated December 12, 1980, is on file. It notes a focal defect in the superior facet of L-5 on the left, but is inconclusive in determining its causation. A possible relationship to pre-trauma

is, however, among the suggested sources. Additional X-rays were taken at the request of Dr. Bailey on April 30, 1982, and in the opinion of Dr. W.G. Trusler, there was no evidence of any bone, joint or soft tissue abnormality in the right hip area.

The mass on the right buttock continued over time to provide a source of complaint, and was surgically removed on May 6, 1983, by Dr. R. Holliday, general surgeon. In his opinion, as stated in his report dated May 31, 1983, the mass excised from the right buttock was determined to have been a "fat necrosis with extensive calcification". In this opinion, Dr. Holliday further indicated that this condition is related to the original trauma. Although not considered to have been related to the accident at earlier stages, this problem was found to have been compensable at the Appeals Adjudicator level.

A report from Dr. Holliday dated December 13, 1984, (after the Appeals Adjudicator hearing) indicates that the worker is still having some difficulty with respect to these particular problems. In her testimony before the Panel the worker indicated that she is still totally disabled as a result of the 1977 accident. Because of her disability, she was not even able to carry on her household duties, and for this reason during the years 1980 to 1984 her mother-in-law was forced to move in with her family to help. In her testimony the worker also indicated that between the time she left her employment with the accident employer and the date of the hearing she never did any work whatsoever and did not suffer any other incident that could have caused her ongoing total disability. The worker finally testified that prior to 1977 she was in very good health.

Entitlement beyond April 12, 1978, was denied at the Claims Review Branch level by letter dated January 21, 1981. Among the reasons cited was the lack of treatment of complaints between May 4, 1978, and November 27, 1979, and the lack of any mention whatsoever of neck pain prior to Dr. Bailey's report of September 30, 1980. The medical evidence was reviewed by a WCB Medical Advisor, who concluded that there was no entitlement at all for the neck or the cyst, nor was there any entitlement for the original injury past April 12, 1978.

The matter came before Appeals Adjudicator, J.V. D'Andrea, on April 16, 1984, and a decision issued, allowing the appeal in part, on May 16, 1984. The Appeals Adjudicator found there to be an entitlement in respect of the surgery to remove the fat necrosis in the worker's right buttock on the advise of Dr. Doyle, a WCB surgical consultant. Also in accordance with Dr. Doyle's opinion, the Appeals Adjudicator granted three weeks total temporary benefits, from May 6, 1983, to May 27, 1983, to allow for recovery from the surgery. In respect of her complaint of continuing neck and low back pain, it was held that the preponderance of the medical evidence did not support the contention that it was related to her industrial accident of December 12, 1977.

The issues before this Panel therefore are;

- (a) Whether the worker is entitled to full or partial temporary disability benefits for the period from April 12, 1978, to the present (apart from any time for which she has already been granted benefits or during which she was working at her full pre-accident salary), as a result of her industrial accident of December 12, 1977.

- (b) Whether the worker continues to suffer from a neck or low back disability as a result of the same accident to such an extent as to entitle her to continuing temporary benefits in respect thereof.
- (c) Whether the worker continues to suffer from a disability in respect of the injury to her buttock and the resultant surgery to such an extent as to entitle her to continuing temporary benefits in respect thereof.

THE PANEL'S REASONING

There is no issue that the worker suffered a compensable accident on December 12, 1977. According to the medical report before the Panel the accident was not a very serious one. Furthermore, there is no organic evidence supporting the position advanced by the worker who claims to be still totally disabled as a result of this accident.

There is also no evidence before the Panel indicating that the worker is suffering from a psychological condition that may render her totally disabled.

The worker's representative argued that the worker was in perfect health before the accident, did not suffer any other incident after the compensable accident in 1977 and, therefore, her total disability could only be traced, insofar as causation, to the compensable accident, this being a traumatic event that literally changed the life of this worker. On this ground Mr. Sousa submitted that the appeal should be allowed.

The position of the employer's representative is that the accident took place nine years ago. By April 11, 1978, the worker fully recovered as indicated in the report filed by her family physician. Mr. Carroll further argued that the worker did not establish continuity of complaints during the period from April, 1978, to November, 1979. It was further submitted that her present condition is not medically compatible with the diagnosis provided by several specialists who examined the worker during the years after the accident and prior to this hearing. Mr. Carroll further argued that at most the worker is partially disabled. However, she did not seek suitable employment after the termination of her working relationship with the accident employer. Regarding the issue that the worker might be suffering from what is known as "chronic pain", Mr. Carroll submitted that the evidence does not support the claim that the pain was so severe to render the worker unable to perform any kind of employment.

We are of the view that the position submitted by Mr. Carroll in this case is convincing.

During the summer of 1978, upon being certified to be fit to return to work, the worker was offered a very light duty job by the accident employer. However, the worker testified that she was unable to perform it.

Subsequent to the termination of her employment with the accident employer, there is evidence before the Panel that the worker declared herself capable and available for employment to the Unemployment Insurance Commission and received benefits until December, 1978.

Even though the worker indicated in her testimony having seen her family doctor once a week during the period from May 1, 1978, to the end of 1979, there is inconclusive evidence before the Panel of the symptoms as reported to the family doctor. In this regard, Mr. Carroll argued that it was the worker's responsibility to provide the reports of these examinations not only to the Panel but also to the WCB. Apparently the WCB attempted to obtain those documents, however, they could not be obtained, the reason being that Dr. Berger is no longer in practice and the worker's file could not be located by the practitioner who continued Dr. Berger's practice.

In reply to the position on this issue taken by Mr. Carroll, we are of the view that there is no burden or duty upon the worker to provide these documents to the WCB as a condition of entitlement. The documents are important as an evidentiary matter to establish whether or not during the period in question the worker was still suffering as a result of a compensable accident. This kind of evidence, however, is not the only factor that might determine, in a given set of circumstances, whether the continuity test is established. On the evidence, we are of the view that the worker did visit her family physician on a regular basis, however, the presenting problem during this period was not the pain in her back and hip area but in her abdomen. This view is supported by the fact that abdominal pain was also the cause that triggered the examination with Dr. J.P. Grebez on May 26, 1980, the doctor who subsequently became her new family physician.

We accept the submissions of Mr. Carroll that the medical evidence before the Panel does not indicate that there is anything organically wrong with the worker. Because of this finding, the issue of "chronic pain" is to be addressed in order to determine whether the worker might have been rendered either partially or totally disabled by "chronic pain". Upon a careful review of the testimony of several witnesses, including the worker, we are of the view that the worker, while claiming to be totally disabled, was able to engage herself in a number of activities that could not be undertaken by a person suffering from disabling pain.

We accept the evidence of the two co-workers who indicated having observed the worker engage herself in babysitting activities with at least four small children ranging from the age of 2 to 8 years old, for a number of years. One co-worker was a neighbour of the worker and had the opportunity to observe and discuss with neighbours the babysitting activities conducted by the worker. The other co-worker, went to her home sometime in 1982 to pick-up, with her sister, her niece who was less than a year old at the time. According to her testimony, the small baby was taken care of by the worker for several months in that year, for a consideration.

The worker admitted that babysitting was provided in her home, however, she submitted that it was an activity totally under the care and control of her mother-in-law who had come to stay with them to help her between 1980 and 1984. We are of the view that the evidence of the worker in this regard is misleading because babysitting activities were observed by a co-worker prior to the arrival of the mother-in-law and after her departure.

Both co-workers testified that during the years that followed the accident they had occasion to see the worker on a regular basis -- one co-worker because, as indicated, she was a neighbour of the worker between 1978 and 1984, and the other

co-worker, because she saw the worker almost weekly at the church they both attended every Sunday. Both co-workers indicated that they never noted any limping or any other sign of a disability affecting the worker. This was in sharp contrast with the posture and walking difficulty demonstrated by the worker throughout the hearing and during recess.

In addition to this testimony, one of the co-workers indicated that approximately a year and a half ago the worker was noticed in the London downtown area, in the earlier part of the evening, with other persons moving from one office building to another one. Months later, after this co-worker was notified that the worker had started an appeal in front of this Tribunal, the worker was once again seen in the London downtown area, again in the early evening, pushing a janitorial bucket from one side of the street to the other. At the time, the worker was moving very fast in order not to miss the green light at the intersection.

There is also evidence, from the other co-worker, that in August, 1985, she observed the worker mixing cement and carrying bricks while assisting her husband who had been retained as a subcontractor to build the co-worker's new house.

For these reasons we are of the view that on April 12, 1978, the worker fully recovered from the disabling consequences of her December 12, 1977, accident. We further concur with the view expressed by the Appeals Adjudicator that the fat necrosis in the right buttock resulted from the compensable accident, and that this condition did not render, by itself, the worker disabled at any time during the period from the compensable accident to the date of the hearing except for the three weeks already granted to the worker by the Appeals Adjudicator's ruling. On those grounds, the decision of the Appeals Adjudicator should not be disturbed.

DECISION

The worker's appeal and employer's cross appeal are both dismissed.

DATED at Toronto, this 25th day of June, 1986.

SIGNED: A. Signoroni, D. Jewell, F. Lankin.

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Workers' Compensation Appeals Tribunal

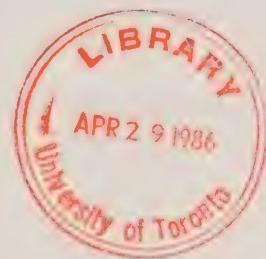
DECISION NO. 65

Tribunal d'appel des accidents du travail

Panel Chairman: A. Signoroni

Member: N. McCombie

Member: K. Preston



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

March 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 65

THE APPEAL PROCEDURE:

The employer appeals the May 31st, 1985, decision of the Workers' Compensation Board Appeals Adjudicator, N. Holsmer, in which the Claims Review Branch Decision of August 31, 1984, was overruled.

The appeal was heard on February 12th, 1986, by a Panel of the Appeals Tribunal consisting of A. Signoroni, Panel Chairman, N. McCombie, a member of the Tribunal representative of workers and K. Preston, a member of the Tribunal representative of employers.

The employer appeared and was represented by Mr. A.D. Murray. The worker also appeared and was represented by Mr. J. Bujold, Vice General Chairman, Brotherhood of Railway Airline & Steamship Clerks. The Tribunal was assisted by V. Mark, a member of the Tribunal Counsel Office.

The Panel heard and considered evidence given under oath by the worker in oral testimony. The Panel also read the Case Description recital of facts prepared by the Tribunal Counsel and agreed to by the employer's representative and by the worker's representative.

The Panel further read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description materials.

The Case Description was filed as Exhibit #1 at the hearing. In addition, a medical report from Dr. V.M. Campbell, dated February 11th, 1986, was entered as evidence at the hearing as Exhibit #2 and considered by the Panel.

Submissions were made by the employer's representative, the worker's representative and Tribunal Counsel.

THE ISSUE AND HOW IT ARISES:

The worker's claim arises out of an incident at work on March 30th, 1978. The worker was a freight handler employed since 1976 with the same employer.

The accident occurred while the worker was pushing a cart when the removable back of the cart suddenly came out and the steel insert on the bottom struck the worker's right leg. Moments after the accident he experienced pain, swelling and difficulty in walking.

On the same day, the worker was seen by Dr. E.J. Franczak, for a bruised right lower leg, tibial area, and was ordered off work for four days. Temporary total benefits were paid accordingly.

The worker testified that although he was able to return to work on April 3rd, 1978, his leg was still painful and swollen. Although the pain gradually went away, the swelling did not. Instead, the swelling developed along the leg during the following years. Apart from the fact that the swelling was not aesthetically pleasant, this condition, being pain-free, did not cause much concern to the worker during the next six years and he was able to perform his work without any problem. Throughout this time, the worker said he did not suffer any other incident affecting the same area in the leg.

In the spring of 1984, this situation changed because the pain recurred. By this time, the worker had developed a varicose vein over the anterior aspect of his right leg which was the site of the initial trauma. The varicose vein was treated by way of a surgical intervention as indicated by Dr. V.M. Campbell, a specialist in vascular and general surgery, in his report dated July 13th, 1984.

In August, 1984, Dr. M.E. Mitchell, a medical advisor with the Claims Section of the WCB, was asked to review this case and to give her opinion as to the cause of the disability. In her letter directed to Dr. V.M. Campbell she wrote :

"This was a very minor accident and we do not see how it could possibly have been the cause of his varicose veins."

Upon receipt of the letter from Dr. M.E. Mitchell, Dr. V.M. Campbell replied as follows :

"As I stated to you on the phone, I did do a ligation and stripping of his long saphenous vein because he had some valvular incompetence. The only reason why I did this was to do a complete operation so that he does not get any recurrent varicosities.

However, as I stated, there is a possibility that the vein on the anterior aspect of his leg may never have become symptomatic if he had not had the previous trauma It is unusual to see this particular vein so hugely varicose while the main saphenous vein is only minimally diseased. I feel, therefore, that valvular incompetence contributed to the progression. The inciting event, in fact, was the initial trauma."

Entitlement for the removal by surgery of the worker's varicose vein was denied by the Claims Review Branch as follows :

"The Claims Review Branch notes that there is no established continuity of complaints of ongoing problems to your leg, nor was there any evidence of continuous medical attention. The Claims Review Branch accepted our Medical Advisor's opinion and concludes that the varicose vein in your right leg is not due to your accident of March 30th, 1978."

Additional medical evidence generated after the Claims Review Branch decision indicates that Dr. E.J. Franczak agreed with the position taken by Dr. V.M. Campbell. On the other hand, Dr. MacFarlane, a surgical consultant with the WCB, in his report dated February 28th, 1985, writes :

"This is not an acceptable claim - trauma was insignificant - time lapse was very significant."

On further appeal by the worker, the decision rendered by the Claims Review Branch was reversed by the Appeals Adjudicator who, having found conflicting medical opinions equal in weight, applied the benefit-of-doubt principle in favour of the worker.

The issue for this Panel, therefore, is whether the worker's varicose vein and subsequent surgery in 1984 resulted from the accident of March 30th, 1978.

THE PANEL'S REASONING:

At the hearing, the Panel found the worker to be credible in his testimony. There is no dispute that the worker suffered a compensable injury to his right lower leg, tibial area, on March 30th, 1978.

The employer's representative took the position that the original trauma was minor, and that the time lapse between the original trauma and the surgical intervention in 1984, required to treat the varicose vein, was extremely long. He further submitted it was simply by coincidence that the varicose vein developed in the same area of the right lower leg where the worker suffered the original trauma.

On the other hand, (as documented in his written submissions) the worker's representative relied very strongly upon the medical opinion of Dr. V.M. Campbell, and argued that the varicose vein and the surgery to treat it would not likely have been required had the 1978 injury not occurred.

In deciding whether the 1984 disability resulted from the 1978 injury, this Panel has considered the injury caused by the 1978 accident, the worker's condition after the original injury and prior to the 1984 surgery, and the disability suffered in 1984.

The injury caused by the 1978 accident

In addition to the worker's testimony at the hearing, there are only two medical reports dealing with the March 30th, 1978, injury.

Both reports are from Dr. E.A. Franczak, and they clearly establish that the worker suffered a bruise localized in the right lower leg, that he was treated with cold packs, and that he was ordered to return to his work on April 3rd, 1978. At that time, the leg was better even though there was some residual swelling. The worker confirmed these facts in his testimony.

The worker's condition after the original injury and prior to the 1984 surgery

The only evidence available to the Panel dealing with the worker's condition during the six year period between the accident and 1984 comes from the worker's testimony.

As indicated by Dr. E.J. Franczak, the leg was still swollen when the worker returned to work. According to the worker's testimony, although the pain subsided within a month, the swelling remained and grew larger and in a "snake-like fashion" over time. Having found the worker to be credible, the Panel concluded that there was a residual non-disabling condition arising from the 1978 accident which persisted until the early part of 1984.

The disability suffered in 1984

From the evidence introduced, it was not disputed that the worker developed a varicose vein over the anterior aspect of his right leg. The varicosity was initially diagnosed by Dr. E.J. Franczak in his report dated October 2nd, 1984, and it was subsequently confirmed by every other physician involved in this case.

Compensation

To establish entitlement to compensation benefits for lost wages and health care expenses, it must be shown that the disability results from an injury which is caused by a work-related accident.

In this case, there was a work related accident on March 30th, 1978. It caused the injury of the worker's right lower leg. The issue is whether the disability suffered by the worker after the varicose vein was diagnosed results from the 1978 injury.

The medical evidence dealing with this issue is that of four physicians. The two doctors who support the causal relationship between the 1978 injury and the varicose vein are Dr. E.J. Franczak and Dr. V.M. Campbell. Dr. Franczak is the doctor who treated the worker for the 1978 injury. Dr. V.M. Campbell is a specialist in the field of vascular surgery and the doctor who performed the ligation and stripping of the long saphenous vein (one of the superficial veins of the leg).

The medical evidence rejecting the causal relationship comes from Dr. M.E. Mitchell, a Medical Advisor from the Medical Branch of the WCB and from Dr. E.J. MacFarlane, a Surgical Consultant with the WCB.

Dr. V.M. Campbell's four reports, prepared between July 13th, 1984, and February 11th, 1986, indicate a progressive certainty on his part that a causal relationship exists. This progression culminated in his last report which reads, in part :

"It is very clear from the history of onset that this was a work related injury which then went on to develop into a significant problem requiring varicose vein operation..."

As I stated in that letter (a previous letter to the WCB, dated April 15th, 1985,) I see lots of working people with varicose veins and tell them it is not a compensable problem. However (the worker's) situation stems from a work related injury and is therefore compensable."

Dr. E.J. Franczak, the attending physician in the 1978 accident and the doctor to whom the worker first complained of the varicose vein problem, reported in a letter dated October 2nd, 1984 :

"I certainly concur with Dr. V.M. Campbell's report that because the varicose vein came subsequent to the injury in the identical position that it could be related to the trauma."

On the other hand, Dr. M.R. Mitchell's view was that :

"...there was a very minor accident and we (the Board) do not see how it could possibly have been the cause of his varicose veins."

Finally, Dr. E.J. MacFarlane, in a memo to the Appeals Adjudicator dated February 28th, 1985 states :

"I have reviewed the file and discussed with my surgical confreres. This is not an acceptable claim -- trauma was insignificant -- time lapse is very significant."

In considering these contradictory medical opinions, the Panel finds the evidence of Dr. E.J. Franczak and Dr. V.M. Campbell, the only two physicians who examined the worker, more persuasive than that of Dr. M.E. Mitchell and Dr. E.J. MacFarlane. In particular, the Panel notes Dr. V.M. Campbell's opinion to the effect that :

- (a) the site of the varicose vein corresponded with the site of the original trauma; and
- (b) while there was some underlying valvular incompetence, it is unusual to see this particular vein so hugely varicose while the main saphenous vein is only minimally diseased.

The medical evidence available from the Board's doctors does not deal with these facts which appear to support a relationship between the original injury and the later disability.

With regard to the temporal relationship, the employer felt it very significant that there was a six year lapse in time between the original trauma and the varicose vein. This concern was also expressed by Dr. E.J. MacFarlane in his diagnosis.

Had there been no symptoms during this period, the Panel would be confronted by a more difficult issue. However, on the facts as found, after the 1978 injury the worker was left with a residual swelling that grew larger, though without pain, over time. This non-disabling condition ultimately became symptomatic early in 1984 and surgery was finally required to correct it. Once this fact is accepted, the time lapse becomes less problematic.

Finally, with the exception of Dr. V.M. Campbell's allusion to the worker's predisposition - the valvular incompetence - there is no other medical evidence indicating the presence of an alternative cause of the disability. However, even though the valvular incompetence contributed to the progression of the varicose vein, the 1978 injury, although minor, was nonetheless the direct cause of the disability in issue.

CONCLUSION:

The Panel has considered all the evidence and it has concluded that the disability suffered in 1984, when surgery was required to treat a varicose vein, resulted from the injury caused by the compensable accident of March 30th, 1978. The worker is therefore entitled to compensation benefits for lost wages and health care benefits during the period in issue.

DECISION:

The appeal is dismissed. The worker's entitlement to compensation remains as determined by the Board's Appeals Adjudicator.

Dated at Toronto, Ontario this 27th day of March, 1986.

Signed : A. Signoroni, K. Preston, N. McCombie

CASE
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Workers' Compensation Appeals Tribunal

DECISION NO. 67

Tribunal d'appel des accidents du travail

PANEL CHAIRMAN: L. BRADBURY

MEMBER: F. LANKIN

MEMBER: J. RONSON



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

APRIL, 1986

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 67

THE APPEAL PROCEDURE:

The worker appeals the June 26th, 1985, decision of Workers' Compensation Board Appeals Adjudicator, Mr. M.C. Turner.

The appeal was heard on February 14th, 1986, by a Panel of the Appeals Tribunal consisting of L. Bradbury, Panel Chairman, F. Lankin, a member of the Tribunal representative of workers and J. Ronson, a member of the Tribunal representative of employers.

The worker appeared and was represented by Mr. R. Ayres, from the United Brewers Warehousing Union. The employer was represented by Mr. J. Petrushevsky. The Tribunal was assisted by R. Nairn, a member of the Tribunal's Counsel Office who appeared in the role of Tribunal counsel.

The Panel heard and considered evidence under oath by the worker given in oral testimony.

The Panel read the Case Description recital of facts prepared by the Tribunal's counsel and agreed to by the parties. The Panel further read the relevant forms, memoranda, reports and medical reports extracted from the WCB file and collected in the Case Description materials. The Case Description was filed as Exhibit No.1 at the hearing.

The Panel also received and considered a copy of the transcript of proceedings of the Appeals Adjudicator hearing, June 17th, 1985, which was marked as Exhibit No.2 at the hearing.

Submissions were made by the worker's representative, the employer's representative and Tribunal Counsel.

THE ISSUE AND HOW IT ARISES:

On December 6th, 1974, while employed as a letter carrier, the worker slipped on some ice and suffered a compensable injury involving an inversion sprain of his left ankle. The worker continued to have problems with his ankle and received ongoing medical treatment including a cast, tensor bandages and crutches. He received compensation from WCB for his time off work.

By the end of March, 1975, the worker returned to work as a letter carrier and continued in that position until May, 1976. There is evidence that he continued to have ankle difficulties throughout that period due to recurrent inversion sprains in his ankle. It was suggested by orthopaedic specialist, Dr. G. McDonald in a report dated May 3, 1976, that surgery would be necessary to correct his recurring problem.

In May, 1976, the worker found that he could no longer continue in the position of letter carrier due to ongoing problems with his ankle. In July, 1976, he ceased his employment with the accident employer. Surgery was carried out on the ankle on September 14th, 1976. The worker's recovery was complicated by an infection of the wound and pneumonia. In May, 1977, the worker commenced employment as a taxi driver and this continues to be his occupation.

On August 15th, 1978, the worker was assessed by the Pensions Section of the WCB and awarded a 3% permanent partial disability pension for his ankle. On September 17th, 1979, the pension was reassessed and was increased to 5%. On March 28th, 1983, the pension was again reassessed and increased to 10%.

It is the worker's evidence that throughout the years he has continued to experience pain in his left ankle and that at times the pain and swelling have increased to the point where he was required to seek further medical treatment.

Documents from the WCB file indicate that from May 24th, 1983, to October 17th, 1983, the worker was unable to work and was in receipt of temporary total disability benefits in addition to his pension. The worker again laid off work as a taxi driver on May 17th, 1984, and his temporary total disability benefits were restored. The WCB terminated those benefits as of November 7th, 1984, although the worker did not actually return to work until March 1st, 1985, and claims to have been disabled throughout that period.

The Appeals Adjudicator decision of June 26th, 1985, confirmed the decision to deny benefits after November 7th, 1984, and concluded that the worker ... "was not disabled beyond the level of his permanent disability, specifically in respect of the condition of his left ankle."

The issue before this Panel, therefore, is whether the worker is entitled to temporary total disability benefits (above and beyond his permanent pension level) during the period from November 7th, 1984, to March 1st, 1985.

THE PANEL'S REASONING:

The worker's evidence was that throughout the period in question he continued to have problems with his ankle to the point that he was often unable to care for himself in his home and required assistance. Although there was no direct evidence called in support of the worker's statement, the worker's representative directed the Panel to evidence given at the Appeals Adjudicator hearing by a friend of the worker's who appeared as a witness at that hearing. The witness's testimony is at pages 14 through 16 of the transcript.

The witness testified that he was a friend of the worker's and during the period of November, 1984, to March, 1985, he often went over to the worker's house to "look after him and keep his foot elevated, and take him to the doctor and that, cook for him". It was his evidence that the worker's ankle problems were disabling during that period to the point that he required assistance in his usual daily domestic activities.

The relevant medical reports on this appeal are from Dr. E. English, the worker's treating orthopaedic specialist. These reports are somewhat confusing, but can be set out as follows:

- 1) A letter dated September 12, 1984, from Dr. E. English to WCB which stated:

"This man does not seem to be highly motivated to work on a regular basis. However, he has had a lot of trouble with the Compensation Board which makes it very difficult to take care of this man since he feels always hassled by the Compensation Board."

- 2) Dr. English's Progress Report, to WCB dated September 12, 1984, stated in response to questions following an examination on September 12, 1984:

Could patient:

- a) Do usual work - no
- b) Do part-time suitable work - no
- c) How long will patient be disabled - more than 21 days.

- 3) Dr. English's Progress Report to WCB dated November 5, 1984, also based on an examination on September 12, 1984, stated in response to questions:

- a) could patient do usual work - no
- b) could patient do modified work - yes, taxi driver for cars.

- 4) A letter dated December 18, 1984, in which Dr. English reported again on the September 12, 1984, examination states:

"I felt at the time that he was incapable of going back to work ..."

- 5) A letter dated January 8, 1985, following an examination of the worker on that date, reports:

"Continues having left ankle pain, pain in the lateral side of his ankle extending up into the lateral calf."

While discussing that he does not think further surgery is in order, Dr. English states that:

"I just think if he limits his physical activities, he works at a job where he does not require to get up and move around too much, he won't have as much pain as if he's active."

"The patient himself doesn't feel that he can go out to employment, although I feel now his symptoms have improved to the point where he could return to some modified light work. Even as a taxi driver he doesn't feel that he is capable of doing this type of work."

"We'll just have to wait and see what his functional activities are, but I certainly don't feel that any surgery should be offered."

The problem facing the Panel in making a finding with regard to the worker's condition during the period in question is that the only medical evidence the Panel has before it is the conflicting reports of Dr. English, four of which appear to be based on the same examination of September 12, 1984. Even if we consider giving greater weight to the two reports that were actually prepared on the date of the examination, assuming that the doctor's findings reported therein more likely reflect the worker's condition on that day, we are left with one report suggesting that the worker does not seem to be highly motivated to work on a regular basis and a second report suggesting that the patient was unable to do part-time suitable work at the time of the examination. While those two statements are not completely contradictory, they certainly leave some questions unanswered in the minds of the Panel.

The Board's decision with regard to termination of benefits appears to have been based on Dr. English's letter dated September 12, 1984, and his Progress Report dated November 5, 1984. The WCB appears to have considered and rejected Dr. English's other two reports which include the Progress Report of September 12, 1984, and his letter dated December 18, 1984.

The Board also had regard for the opinion of its surgical consultant, Dr. Teskey, who stated in memo #183 (the date appears to be September, 1984) that: "Agree I.W. at P.D. level". This opinion, as well as Dr. English's November 5, 1984, report, were relied on by the Board in denying compensation after November 7, 1984.

The worker's evidence that he was disabled during the period in question is supported by his Progress Report to WCB, dated September 13, 1984, following his examination by Dr. English on September 12, 1984. The worker responded to the question "Did your doctor say you can return to work?" by checking "no".

The Panel is satisfied that up to the date of Dr. English's report on January 8, 1985, the medical and other evidence is approximately equal in weight. Thus, the principle of the benefit of the doubt should apply and should be resolved in favour of the worker. The Panel, therefore, concludes that the worker was totally disabled between November 7, 1984, and January 8, 1985, as a result of his left ankle problem.

With regard to the period from January 8, 1985, to March 1, 1985, the Panel relies on Dr. English's report of January 8, 1985, which followed his examination of the worker on the same day. Dr. English reported that the worker's condition had improved to the point where he was capable of performing modified work. The Panel concludes that the worker was partially disabled until March 1, 1985, when he returned to his regular work.

DECISION:

The appeal is allowed in part. The Panel finds that the worker was totally disabled from November 7, 1984, until January 8, 1985, and was partially disabled from January 8, 1985, until March 1, 1985.

The Panel leaves to the WCB the determination of whether the worker was available for employment that was available and suitable during the period from January 8, 1985, until March 1, 1985.

The worker has a right of further appeal to this Tribunal should there be any dispute arising from the Board's determination.

DATED at Toronto, Ontario this 16th day of April, 1986.

SIGNED: L. Bradbury, F. Lankin, J. Ronson

1981
CANADA

Workers' Compensation Appeals Tribunal

DECISION NO. 69

Tribunal d'appel des accidents du travail

Panel Chairman: N. Catton

Member: B. Cook

Member: K. Preston



LEGAL RESEARCH AND PUBLICATIONS DEPARTMENT

April 1986

Workers' Compensation Appeals Tribunal

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WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 69

APPEAL PROCEDURE:

The worker is appealing a decision of the Appeals Adjudicator, Mr. J.V. D'Andrea, dated December 5, 1984.

The appeal was heard on February 14, 1986, by a Panel of the Tribunal consisting of N. Catton, Panel Chairman, B. Cook, a member of the Tribunal representative of workers, and K. Preston, a member of the Tribunal representative of employers.

The worker appeared and gave evidence under oath. He was represented by Mr. John Martin of the United Steel Workers of America. The employer was represented by Mr. John Kupecki, Employee Relations Assistant. The Panel was also assisted by J. Marshall a member of the Tribunal Counsel Office.

The Panel considered the Case Description prepared by Ms. Marshall. The facts outlined in the Case Description were agreed to by both the worker's and the employer's representatives. Attached to the Case Description were copies of forms, memoranda, and medical reports taken from the Workers' Compensation file. Mr. Martin provided the Panel with forms used by the employer to report an accident. The Panel and the parties were also provided with a number of authorities on the issue of "disablement arising out of and in the course of employment".

THE ISSUE AND HOW IT ARISES:

The worker is claiming temporary total benefits for the period May 10, 1983, to May 26, 1983.

From April 16, 1983, until May 10, 1983, the appellant was working as a strapper. The best description of that job comes from his letter submitted to the Board on June 16, 1983. The worker wrote:

"I am required to pull a band out of the band rolling machine and make a large loop and throw it over a coil that lays flat on a line. Sometimes the coil end requires quite a bit of pulling to get it wrapped around properly. After tightening the band by hand I reach over and grab a tool with my left arm and put it on the band to tighten it. This tool weighs about 5 lbs. Then I would grab another tool that weighs about 3 lbs. and crimp the clip on the band. I would do all of this action with my left arm.

Then I would wobble the first tool to break the band away from the coil and repeat the process over again. There is a big fan and blower facing my left side while doing this process."

The worker demonstrated this process to the Panel at the hearing and testified that he banded about 40 coils of steel an hour. The employer confirmed that this was an adequate reflection of the work being carried out. The working conditions are also noteworthy. Because of the extreme heat, strappers worked one hour and rested one hour.

The worker testified that during the two days prior to May 10, 1983, he had experienced some aches and pains in his left side but felt fine when reporting to work on May 10, 1983. During this shift he began to experience pain in the left shoulder and numbness in the left leg and side. He went to the rest shack and requested that the foreman be called. The foreman came and the worker was taken to the first aid clinic at the plant and then taken to the emergency department of a local hospital. When he arrived at the hospital his left arm was shaking and he was complaining of pain in the left shoulder and leg. The shaking had stopped by the time the worker was discharged from the hospital. The next day he saw his family physician, Dr. Cornfield, who diagnosed a dorso-lumbar sprain and prescribed muscle relaxants and physiotherapy. In his report dated May 11, 1983, Dr. Cornfield reported to the Board that the worker was unable to continue with his normal work.

The worker remained off work until May 26, 1983, and then returned to the same job. He was subsequently transferred to another job and has not had a recurrence of the problem.

For the worker to be entitled to benefits it must be established that he suffered an accident as defined by the Workers' Compensation Act. In the Act, accident includes:

- (i) a wilful and intentional act, not being the act of the worker,
- (ii) a chance event occasioned by a physical or natural cause, and
- (iii) disablement¹ arising out of and in the course of employment.

We must also determine whether or not the injury was "by accident" and whether that injury disabled the worker from his normal work from May 10, 1983, until May 26, 1983.

THE PANEL'S REASONING:

The worker is not claiming that anything unusual occurred during his employment, but simply that the nature of his regular work caused a dorso-lumbar sprain. His injury could therefore not be caused by either a "chance event" or the "wilful and intentional act" of someone else.

¹ Any reference to the Act in this decision refers to the Workers Compensation Act as it was prior to April 1985.

At the hearing the worker's representative argued that the worker had undergone a change in jobs which could account for the disability. This argument is based on the Board's policy which suggests that a disability may be compensable if it results from unaccustomed work. The Panel is not convinced that the work performed between April 17, 1983, and May 10, 1983, was significantly different than the worker's previous duties. Therefore, we cannot find that there was a change in job to account for the onset of symptoms.

The employer's representative argued that the Workers' Compensation Act required something unusual to have occurred during the work for an accident to be established. Mr. Kupecki submitted that in 1963, when the Legislature amended the Act to include "disability arising out of and in the course of the employment" as part of the definition of "accident", it did not intend to provide entitlement for disabilities that occurred during work in the absence of an unusual incident. Following the hearing and after having time to assess the documents provided by the Tribunal's counsel, Mr. Kupecki specifically referred the Panel to Decision No. 129 of the Commissioners of the British Columbia Workers' Compensation Appeals Tribunal. In that decision the Commissioners wrote :

"To be compensable, however, the evidence must warrant a conclusion that there is something in the employment that had causative significance in producing the injury. A speculative possibility that this might be so is not enough."

In the Panel's opinion the expanded version of the definition of "accident" was intended to provide coverage to workers who did not identify a specific incident as the cause of their disability but were able to establish a causal relationship between the work being performed and the disability. There was no need to amend the legislation if a worker was required to identify a specific incident in order to establish an accident. An identified incident is properly considered a "chance event" which was already included in the definition of "accident". We therefore reject the employer's arguments on this issue.

We do, however, accept the employer's submission that a speculative possibility that a disability arose out of the work is not sufficient to qualify a worker for benefits. The onset of a disability at work does not necessarily entitle the worker to Workers' Compensation Benefits. The work being performed must be the probable cause of the disability.

In this case we have found that the disability arose at work. There is no evidence before the Panel that the sprain was caused by non-work activities. As to the causal relationship between the work and the disability, there are three medical opinions available to the Panel to assist it. In a footnote to Memo #12 Dr. M. Hunter of the WCB noted that the condition was medically compatible for neck, left shoulder and arm and upper back, right thoracic area on a disablement basis. In Memo #23 Dr. E.J. Macfarlane, also of the WCB, wrote that he agreed with the Claims Adjudicator's recommendation that the claim be denied.

The only other evidence that possibly speaks about the causation is the medical report from the worker's family physician. In his report Dr. Cornfield noted that there was no unusual accident but he did submit a report to the Workers'

Compensation Board. According to a report from the Board's investigator the doctor prepared a WCB form because the disability began at work. The Panel is not convinced that that any reasonable inferences can be made about Dr. Cornfield's opinion on causation, simply because he completed a WCB form.

In our opinion the onset of the disability at work, the significant physical symptoms, the unusually hot conditions, the fan blowing on the worker's left side and the nature of the work which required a continuous use of the left arm are all facts which substantiate a probable causal relationship between the work performed on May 10, 1983, and the dorso-lumbar sprain. In addition to these facts are the medical opinions of Dr. Hunter and Dr. Macfarlane, which in the Panel's opinion are of equal weight. Bearing in mind the policy on the "Benefit of Doubt" which was in place at the time of the incident, the Panel is of the opinion that the issue of medical causation should be decided in favour of the worker. We therefore conclude that the worker had a disability which resulted from the injury by "accident" at work and he is entitled to benefits for the disability that resulted from the accident.

DECISION:

The appeal is allowed. The WCB is directed to determine the benefits payable to the worker for the period from May 10, 1983, to May 26, 1983.

DATED at Toronto, Ontario this 18th day of April, 1986.

SIGNED: N. Catton, B. Cook, K. Preston

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